(22,486)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 488.

MORRISDALE COAL COMPANY, APPELLANT,

vs.

PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. —.

MORRISDALE COAL COMPANY, Plaintiff-in-Error,

vs.

PENNSYLVANIA RAILROAD COMPANY, Defendant-in-Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

1 April Session, 1908.

Chester N. Farr, Jr.
Wm. A. Glasgow, Jr.
102
John G. Johnson

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

1908	March	3	Præcipe for Summons filed.
"	"	3	Summons exit returnable the first Monday of April, next.
"	"	11	Order for the appearance of John G. Johnson, Esquire, for defendant, filed.
"	April	6	Summons returned "served" and filed.
"	July	17	Statement of Claim filed.
"	"	17	Rule to Plead filed.
"	"	23	Plea filed.
"	September	1	Order to place case on Trial List filed.
1909	June	7	Order to place case on Trial List filed.
"	"	16	And now, to wit, a jury being called come, to wit (see minutes).
"	"	17	And the jurors aforesaid, upon their oaths and affirmations, respectively do say that they find as follows:
			We find as a fact that the amount of the plaintiff's claim is correct and is contained in its exhibit 2, and is:
			Principal $51640.60
			Int. 15515.49
			Total $67156.09

2			Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.
			If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the court the plaintiff may be entitled to recover.
			If, however, the court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant.
"	"	29	Motion for judgment on behalf of plaintiff filed.
			Argued.
1910	January	31	Motion to dismiss action for want of jurisdiction filed.
			Argued.
"	February	5	Opinion, McPherson, J., granting defendant's motion to dismiss for want of jurisdiction filed.
"	"	8	Order of allowance of exception to plaintiff filed.
"	"	10	Præcipe for judgment in favor of defendant and against plaintiff filed. Judgment accordingly.
			Bill of Exceptions filed.
			Assignments of error filed.
			Petition for writ of error filed.
3			Order allowing writ of error filed.
			Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
			Citation allowed and issued.
			Bond sur writ of error filed.
			Order approving bond sur writ of error filed.
			Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Morrisdale Coal Company, Plaintiff, and Pennsylvania Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said Morrisdale Coal Com-

pany, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days,
4 in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 10th day of February, in the year of our Lord one thousand nine hundred and ten.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the Circuit Court of the United States.

Before McPHERSON, *J.*

Allowed.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia, within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein Morrisdale Coal Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered
5 against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge, holding Circuit Court of the United States this 10th day of February, in the year of our Lord one thousand nine hundred and ten.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Service accepted.
JOHN G. JOHNSON,
Attorney for Defendant in Error.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Clerk of the United States Circuit Court.

SIR: Issue Summons in Trespass returnable first Monday of April.

CHESTER N. FARR, JR.,
WILLIAM A. GLASGOW, JR.,
Attorneys for Plaintiff.

March 3, 1908.

6 (Endorsed: Circuit Court of the U. S. E. D. of Pennsylvania. No. 102 of April Term, 1908. The Morrisdale Coal Co. vs. Pennsylvania Railroad Company. Præcipe for Summons. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff.)

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

The President of the United States to the Marshal of the Eastern District of Pennsylvania, Greeting:

We command you, That you summon Pennsylvania Railroad Company, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, at a Session of the same Court to be holden at Philadelphia, on the first Monday of April next, to answer to The Morrisdale Coal Company in a plea of Trespass. And have you then there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 3rd day of March, A. D. 1908, and in the 132nd year of the Independence of the United States.

[SEAL.]

GEORGE BRODBECK,
Deputy Clerk of Circuit Court U. S.

MARCH 3RD, 1908.

At Philadelphia, in my District, served the within writ on Pennsylvania Railroad Company by giving a true and attested copy thereof to Kane S. Green, Assistant Secretary of said com-
7 pany, and making known the contents of the same to him.

So answers

JOHN B. ROBINSON,
U. S. Marshal,
Per ABRAM B. MYERS,
Deputy.

(Endorsed: No. 102. April Session, 1908. Circuit Court United States. Eastern District of Pennsylvania. The Morrisdale Coal Company vs. Pennsylvania Railroad Company. Summons. Trespass. Returnable on the first Monday of April next. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., Attorneys for Plaintiff. Filed Apr. 6, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter my appearance for defendant in the above case.

JOHN G. JOHNSON,
Attorney for said Defendant.

11th March, 1908.

To Clerk of said Court.

8 (Endorsed: No. 102. April Term, 1908. U. S. C. C. Morrisdale Coal Co. vs. Pennsylvania R. R. Co. Order for Appearance. John G. Johnson, Attorney for Defendant. Filed Mar. 11, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement of Claim.

The plaintiff, The Morrisdale Coal Company, claims of the defendant, Pennsylvania Railroad Company, the sum of Two Hundred and Fifty Thousand (250,000) Dollars for injuries inflicted upon the said plaintiff by the said defendant, whereof the following is a statement:

The defendant, the Pennsylvania Railroad Company, a railroad corporation chartered under the laws of the State of Pennsylvania, is a common carrier, and owns and operates standard gauge railroads in the States of Pennsylvania, Maryland, New Jersey, Delaware and New York, and as such common carrier is engaged and employed in the transportation of property and passengers, including coal,

over its said railroad from the coal mines in the State of Pennsylvania, and from other States, to various large cities and
9 places in the above-named States and elsewhere; and delivers coal in cars to other railroads to be carried to other States and more distant points; and delivers and carries coal from such mines as are located upon its road in the State of Pennsylvania to the Great Lakes on the north and tidewater on the east; and as such common carrier is engaged in interstate commerce and is subject to the provisions of an Act of Congress entitled "An Act to regulate Commerce," duly approved February 4, 1887, and to the several acts amendatory and supplemental thereto.

The Morrisdale Coal Company, the plaintiff in this action, is a corporation created and existing under the laws of the State of Pennsylvania, and now owns a tract of land of about three thousand (3,000) acres situated in what is known as the "Clearfield Coal Region" in the County of Clearfield, State of Pennsylvania; and operates, and has, since 1900 and long prior thereto, operated a coal mine or coal mines upon said property on the line of the said Pennsylvania Railroad in the said Clearfield Coal Region in the State of Pennsylvania; and is engaged in selling and shipping coal mined by it, and forwarding the same for sale in the various markets in other States than the State of Pennsylvania and reached by the said Pennsylvania Railroad and its railroad connections; whereby the plaintiff became and was and is a shipper of the said railroad company, delivering coal to it for shipment as aforesaid; and the said Pennsylvania Railroad Company was and is engaged in the business of receiving coal so delivered to it by the said Morrisdale Coal Company, and in forwarding the same over its line of railroad to the lines of its connecting railroads for a continuous carriage or shipment to the various markets in other States than the State of Pennsylvania during the time mentioned herein and at the present time.

The plaintiff avers that the said district known as the
10 Clearfield Coal Region was, during the time herein mentioned, occupied by a great number of other mines or collieries, which mines or collieries also shipped their coal for the purpose of interstate commerce over the Pennsylvania Railroad to the lines of its connecting railroads in other States for a continuous carriage or shipment to the various markets in other States than the State of Pennsylvania during the time mentioned herein; and the said mines and collieries were all competitors with the plaintiff company in the various markets in other States than the State of Pennsylvania, and to tidewater on the east.

The only available outlet for the coal mined by the Morrisdale Coal Co. from its mines on the line of the Pennsylvania Railroad and so shipped from said mines to the markets outside the State of Pennsylvania, was and is by way of the Pennsylvania Railroad and the connections thereof.

During the time mentioned herein and now it was and is unlawful for the said Pennsylvania Railroad Company to give any undue or unreasonable preference or advantage to any particular

person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and it was the duty of the said Railroad Company during the time hereinafter mentioned and now, to offer all reasonable, proper, sufficient and equal facilities to all shippers of coal over its said railroad or line, and to make a fair and proportionate distribution of its car supply and other vehicles and all instrumentalities and facilities for shipment and carriage, irrespective of ownership or contract, express or implied, for the use thereof, for the accommodation of all shippers alike in the said district hereinbefore described. And it was
11 also the duty of the said Railroad Company to distribute all cars in service on its road fairly and proportionately to the said coal mines on, and to shippers of coal over, its said railroad.

Plaintiff avers that for a period beginning January 1, 1900, and ending the last day of December, 1905, the Pennsylvania Railroad Company, defendant, for the purposes of arranging its own car distribution in the said Clearfield Coal Region among the mines and collieries aforesaid, which included those operated by the plaintiff, had rated the capacity of said mines and collieries to produce coal and offer the same for shipment in the said district, at about eighteen thousand (18,000) or nineteen thousand (19,000) tons of output per day; and the said defendant, the Pennsylvania Railroad Company, apportioned to each mine or colliery in the said district a certain percentage of the cars assigned for the transportation of coal in said district by the Pennsylvania Railroad Company, defendant; the said apportionment being rated by the Pennsylvania Railroad Company upon the capacity as calculated by it of each mine or colliery in the said district; and in accordance with the said rating made by the said Pennsylvania Railroad Company, defendant, the plaintiff was scheduled by the said defendant to receive as its daily allotment of cars, during the above period of time, a certain number of the cars in the said district, the said daily allotment varying from time to time in accordance with the estimate placed by the said defendant upon the capacity of the mines of the said plaintiff as compared with the capacity of the other mines and collieries above enumerated situated in the said Clearfield Coal Region, and also with the variations in the number of cars actually placed in said district by the defendant Company, the said cars being used, or being intended to be used, not only for the transportation of coal to points within the State of Pennsylvania, but also for the transportation of coal
12 from the State of Pennsylvania to other States and countries, or for the purposes of interstate commerce. Nevertheless, plaintiff avers that the defendant, in violation of its duty to the plaintiff to see that no undue or unreasonable preference or advantage was given to any person, company, firm, corporation, or locality in the said district, or to subject any particular person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage, failed and refused to assign to the Clearfield Coal Region

for use therein the fair proportion of the entire number of coal cars of said Railroad Company to which said Region was entitled, and to deliver to the plaintiff on reasonable demand being made therefor by the plaintiff, the plaintiff's due proportion or daily allotment of cars which were or should have been assigned by the defendant to shippers in the said Clearfield Coal Region for the transportation of coal, which pro rata allotment of cars the said Pennsylvania Railroad Company, the defendant, should have sent to the plaintiff's mines for the purposes of plaintiff's shipments of coal, as before set forth.

Plaintiff avers that the said failure to so deliver to the plaintiff its proper daily allotment of cars was continued throughout the years from the beginning of 1900 to the close of 1905, as above set forth; that the effect of the said default on the part of the said defendant Company was to subject the plaintiff to an undue or unreasonable prejudice or disadvantage with respect to the facilities for shipping coal offered to the said plaintiff as contrasted with the facilities for shipping coal offered by the said Pennsylvania Railroad Company, the defendant, to the other shippers of coal, competitors of the said plaintiff and situated in the said Clearfield Coal Region. And further, by the failure on the part of the defendant to give to the plaintiff its proper allotment of cars during the period aforesaid,

13 undue and unreasonable preferences and advantages were given to the other mines and collieries in the said Clearfield Coal Region and to shippers in other Coal Regions, over the plaintiff, in that the said mines and collieries were thereby accommodated with car supply and facilities for the shipment of coal greater than that which should be properly allotted to them when compared with the facilities allotted to the plaintiff; and as a result of the said unfair discrimination, the subjection of the plaintiff to the said unreasonable prejudice and disadvantage, and said failure on the part of the defendant Company to give to the plaintiff its proper proportion of the car supply of the said district, a proper allotment of cars for the shipment of coal, and equal facilities with all other shippers in said district for the shipment of coal, the said plaintiff was obliged to buy coal at various times during the years aforesaid, in the outside market, and at the prices then prevailing, for the purpose of fulfilling its contracts which it had entered into at various times during the said year, it being rendered impossible for the said plaintiff to fulfill its said contracts by coal mined in its own mines in the said Clearfield Coal Region by reason of the failure, as set forth above, of the defendant Company to supply it, the plaintiff, with its proper proportion and allotment of cars for the shipment of the said coal.

Plaintiff avers that all of the said coal which it was required to ship by the aforementioned contracts entered into by it during the above years, was coal to be shipped to States other than the State of Pennsylvania, or to foreign countries, and that consequently said shipments were properly subjects of interstate or foreign commerce.

Plaintiff avers that if it had been supplied with the proper amount of cars, or such amounts of cars as were allotted to it at different

times during the above years on the schedule of the Pennsylvania Railroad Company as its proper proportion of the car supply then in the Clearfield Coal Region, it would have been able to fill
14 its contracts by the mining of coal at its mines and the shipping of the same at much cheaper prices than the prices which it was compelled to pay in the open market for the purpose of fulfilling the obligations of its contracts.

Plaintiff avers that by reason of the above defaults on the part of the defendant Company it has suffered damages to the extent of Two Hundred and Fifty Thousand (250,000) Dollars, as aforesaid.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

F. H. Wigton, being duly sworn according to law, deposes and says that he is the President of the Morrisdale Coal Company, the corporation plaintiff in the above statement, and that as such he has full knowledge of the facts set forth therein, and that the facts set forth therein are true.

F. H. WIGTON.

Sworn to and subscribed before me this 17th day of July, A. D. 1908.

[SEAL.] IRWIN SHUPP, JR.,
Notary Public.

My commission expires January 16, 1909.

(Endorsed:) C. C. of U. S. for E. D. of Penn. No. 102 of April Sessions, 1908. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Plaintiff's Statement of Claim. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff. Filed Jul. 17, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.

15 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Rule to Plead.

To the Clerk of the Circuit Court.

SIR: Enter rule on the defendant in the above case to plead within fifteen (15) days or judgment according to law.

CHESTER N. FARR, JR.,
WILLIAM A. GLASGOW, JR.,
Attorneys for Plaintiff.

July 17th, 1908.

(Endorsed: Circuit Court of the United States, Eastern District of Pennsylvania. No. 102 of April Sessions, 1908. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Rule to Plead. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff. Filed July 17, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

16 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Pleas.

The defendant in the above case pleads "Not Guilty" and "Actio non accrevit infra sex annos."

JOHN G. JOHNSON,
Attorney for Defendant.

To the Clerk of the Circuit Court.

July 22nd, 1908.

(Endorsed: 102. April Term, 1908. U. S. C. C. Morrisdale Coal Company vs. Pennsylvania R. R. Co. Pleas. John G. Johnson. Filed July 23, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

And afterwards, to wit, on the 16th day of June, 1909, a jury being called, comes to wit:

A. J. Odenwelder.	Frederick Blacker.
Jay Bachman.	John K. Harding.
Solomon J. Pusey.	Elwood H. James.
Milton Mendenhall.	Norman D. Maule.
D. D. Fisher.	J. K. Rabonold.
John C. Dessalet.	John J. Cameron.

17 who are respectively sworn or affirmed to try the issue joined.

And afterwards, to wit, on the 17th day of June, 1909, the jurors aforesaid upon their oaths and affirmations, respectively do say that they find as follows:

We find as a fact that the amount of the plaintiff's claim is correct and is contained in its exhibit, and is

Principal	$51,640.60
Int.	15,515.49
Total	$67,156.09

Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.

If the Court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant.

18 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered, that in the said April Sessions came the plaintiff into the said Court and impleaded the said defendant in a certain action of trespass, etc., in which the said plaintiff declared (Prout narr.) and the said defendant pleaded (Prout plea). Thereupon issue was joined between them. And afterwards, to wit, at a session of the said Court held at the County of Philadelphia for the Eastern District of Pennsylvania, aforesaid, before the Honorable John B. McPherson, Judge of the said Court, on November 16th and 17th, 1909, the said issue between the said parties came to be tried by a jury of the said District, for that purpose duly impaneled (Prout list of jurors), and at which time came as well the said plaintiff as the said defendant by their respective attorneys, and jurors of the jury aforesaid impaneled, to try the said issue, being duly also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff, and the counsel of the said defendant offered in evidence to the jury the following evidence (Prout stenographer's transcript of evidence):

19 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before Hon. John B. McPherson, J., and a Jury.

PHILADELPHIA, PA., TUESDAY, *November 16th*, 1909.

Present:

Chester N. Farr, Jr., Esq.,
William A. Glasgow, Jr., Esq., for Plaintiff.
Francis I. Gowen, Esq.,
John G. Johnson, Esq., for Defendant.

Plaintiff's Evidence.

FRANK H. WIGTON, having been duly sworn, was examined and testified as follows:

By Mr. GLASGOW:

Q. Where do you live
A. Philadelphia.
Q. How long have you lived in Philadelphia?
A. Since 1865.
Q. Have you any connection with the Morrisdale Coal Company?
A. I have.
Q. What?
A. I am today the president of the Morrisdale Coal Company.
20 Q. How long have you been connected with that company?
A. Since 1895.
Q. What is the business of that company?
A. Mining bituminous coal, shipping it into the market, and selling it.
Q. Where is the coal from the mines of the Morrisdale Coal Company shipped? To what point?
A. The mines are located in what is known as the Clearfield Region, Clearfield County, Pennsylvania, on the line of the Pennsylvania Railroad.
Q. The Tyrone Division?
A. On what is known as the Tyrone Division. They also have other mines, that are not on the Pennsylvania Railroad.

Q. But the mines that are the subject of question here are located in the Clearfield region, on the Tyrone Division?

A. Yes.

Q. Where is the coal that you mine there shipped to, principally? To what destination?

A. Shipped to New York and New England—New York ports.

Q. What part of it is shipped outside of the State of Pennsylvania?

A. I should say ninety-eight or ninety-nine per cent.; practically all.

Q. How many mines, beginning with March, 1902, was the Morrisdale Coal Company operating in the region to which you have referred?

A. They were operating at Morrisdale a shaft known as Morrisdale No. 2. They were operating a drift mine, some distance from that, in the same region, known as Mabel, and subsequent to the date you have mentioned they were operating a drift mine called Madiera, about 20 miles from the Morrisdale shaft?

Q. All of those were in the Clearfield region?

A. They were.

21 Q. And served by the Tyrone Division of the Pennsylvania Railroad?

A. They are.

Q. Is there any other railroad there to serve those mines?

A. Not for those mines.

Q. I say, for those mines?

A. No.

Q. Who had, at that time, beginning with March, 1902, the general supervision and control and direction of the operations, both mining and selling of the Morrisdale Coal Company?

A. I had at that time, 1902.

Q. You had during and down to December,—including December, 1905, did you?

A. I had.

Q. As I understand the situation, when there is no car shortage—when all the cars that the mines demand in the coal region are assigned to that region, there is no difficulty or trouble about shipping the coal? What I mean is, the trouble covered by this case does not arise during the period when all the mines were furnished the cars to which they were entitled?

A. When all the mines had what cars they wanted——

Q. You do not understand the question. Your claim arises in March, 1902?

A. Yes.

Q. And for the periods covered by your claim, are only periods when there is a car shortage in the field?

A. That is correct.

Q. During the time there is not a car shortage, there is no complaint covered by this proceeding?

A. There is not.

Q. What do you mean by car shortage?

A. When there are insufficient cars to meet the requirements or demands of the several operators in the field.

22 Q. In the territory?

A. Yes.

Q. Will you explain to the jury, when there are not enough cars for filling the requirements of the shippers in the district or region, how are the cars divided that are available for shipment by the Pennsylvania Railroad Company?

A. The Pennyslvania Railroad Company establish a capacity for each colliery in the district.

Q. They do that with their own engineers or men?

A. They do that entirely of their own initiative, by themselves Having established this rating, the aggregate of that rating is called the capacity of the region.

Q. You mean the capacity of shipping coal?

A. The capacity to mine and ship coal and whatever proportion your rating bears to the one hundred percentage of aggregate, is your proportion of the car supply which they furnish, and it is divided in that way.

Q. And that is worked out to a percentage basis, is it?

A. It is.

Q. And to each of the mines in the territory is assigned a percentage of the equipment for distribution?

A. There is.

Q. Beginning with March, 1902, or previous thereto, was the Morrisdale Coal Company ready or able to ship the coal which it would have been entitled to ship if the cars up to its capacity or percentage had been furnished to them?

A. The Morrisdale Coal Company, from the collieries located in that district, at all times was able to produce and ship more coal than was even assigned to them as the capacity by the Pennsylvania Railroad Company.

Q. Had you prior to March, 1902, been given cars even

23 more than the percentage to which you were entitled, could you have filled them?

A. We not only could fill them, but when occasion arises in which cars were abandoned in that region, the railroad company gives us the cars in excess of what would have been our regular capacity, and they were loaded and shipped to the market.

Q. That is when other people did not want them?

A. When they did not require them.

Q. Or did not require them, then the Pennsylvania Railroad Company turned them over to you?

A. Yes.

Q. You would fill them and ship them yourself?

A. We did.

Q. Beginning with March, 1902, have you had a statement made up from the distribution sheets of the Pennsylvania Railroad, showing the cars in the field and the assignment thereof to the Morrisdale Coal Company, or what part was assigned to that Company?

A. I have.

Q. Will you please tell the jury what would be the effect upon your company of the failure to furnish you the cars to which you were entitled under your percentage, or to furnish irregularly cars to you under your percentage?

A. The not furnishing of cars up to the percentage, which is what the coal operator is entitled to base his calculation upon, would result in his being unable to fill his own coal obligations that he in all probability had entered into for delivery of coal, and to comply with those obligations, he would be forced to go into the market and purchase coal on the best terms and at the best prices that he could, to carry them out. Another factor arises from insufficient and irregular supply of cars, which prevents the regular working of the colliery, and a colliery such as the Morrisdale shaft, which is equipped for a large output, far in excess of even the capacity which the railroad company has rated, has to keep
24 in constant operation, the pumps have to be kept going constantly, to keep the water out, so that your firemen, your engineers, your pumpers, your superintendents, and all that apply to the preservation and conduct of the mine, when kept in idleness, increases the cost of the coal when it is produced, far in excess of what it should be if it was worked with a degree of regularity, with the proper supply of cars.

Q. Prior to March, 1902, and thereafter, were you constantly in communication with the Pennsylvania Railroad Company on the subject of additional car supply?

A. So constantly that it almost seemed daily, until I suppose they grew as tired of me as I was of going to see them.

Q. Did you inform them of your having contracts to fill?

A. I did, repeatedly.

Q. And that cars were required for that purpose?

A. I did, yes.

Q. Did you keep that up after March of 1902, and down to December, 1905, during the periods covered by your statement?

A. I did.

Q. Giving them the same information?

A. Constantly.

Q. The Pennsylvania Railroad Company had car distribution sheets made up daily for the distribution of cars, did they not, showing the distribution?

A. They had.

Q. Have you seen those sheets?

A. I have, within recent months.

Q. Did you have a statement made up from those sheets, showing, during the period of March, April, May, June, July, August, September, October, November and December, 1902, January, February, May and June, 1903, January, 1904, January,
25 March, May, June, September, October, November, December, 1905, made up showing the total number of cars in that Clearfield region, steel cars or other cars—the total number of wooden cars in the region, and what was assigned to the Berwind-

White Coal Mining Company, and what was assigned to the Morri dale Coal Company in that region, during the period I have men tioned?

A. I had such a statement made up from the sheet furnished t our representative by the Pennsylvania Railroad Company, an summarized in the way you have just outlined.

Q. Was that statement made under your direction?

A. It was.

Q. And observation?

A. Yes.

Q. You compared it with the sheets?

A. I did.

Q. In that statement, which I will refer to in a moment, the cars are spoken of on the distribution sheets as steel cars and wooden cars. Have you any information as to how the steel cars and wooden cars are treated, as far as which is the standard of car distribution in the field?

A. During a portion of that time, the early part of that time, the Pennsylvania Railroad Company considered a wooden car, estimated to carry 25 tons, as the standard, and when a steel car was supplied, it was considered equivalent to two wooden cars. In the latter part of that time, the exact time I am not able to say, they changed that, and called the standard of wooden cars 35 tons, and the steel car was equivalent to one and a half wooden cars, and it was all figured out on the basis of wooden cars.

Q. So that if you got a steel car, or if anybody else got a steel car during the period you have spoken of, the first period, it would be charged as two cars?

A. Yes.

Q. And if you got a steel car during the second period
26 you spoke of, it would be charged as one and a half cars?

A. It would, yes.

Q. You got that information from the Pennsylvania Railroad Company's office?

A. From the Pennsylvania Railroad Company.

Q. I ask you to look at this statement. During the months of March, April and May of 1902, you make no claim for damage in this case?

A. We do not.

Q. During those months the Pennsylvania Railroad Company furnished you more cars than your percentage called for?

A. They did.

Q. And you filled them?

A. We did.

Q. And shipped coal?

A. Shipped coal to market.

Q. Beginning with the month of June, 1902, can you tell us how many, according to the distribution sheets of the Pennsylvania Railroad, steel cars were in that Clearfield region?

Mr. GOWEN: I think it is only fair, before any testimony is

given by Mr. Wigton from this statement, that we should clearly have it explained how this statement is made up.

The COURT: You may examine the witness on that point yourself, unless Mr. Glasgow will do it.

Mr. GLASGOW: I do not know the particular point that Mr. Gowen wants to know about.

The COURT: Mr. Gowen had better do it himself.

Mr. GLASGOW: I am perfectly willing that Mr. Gowen should do it. The point that Mr. Gowen calls my attention to is
27 this: This statement is made up from the basis of what we consider to be the law of this case, that in the distribution of cars to coal mines upon the rated capacity basis, that such cars as are available for shipment of coal should be counted in the distribution. Mr. Gowen, as I understand it, claims that that proposition is not a correct one, and that there are certain cars that should not be counted in the distribution, among them fuel cars for use of the Pennsylvania Railroad, and some other individual cars of mines, of shippers in that territory. I think that is a matter of defence, however, on the part of Mr. Gowen. I am showing by this statement the total number of cars in the field. Mr. Gowen says that the statement is correct, as to the total number, but that the fuel cars should not be counted, and should be deducted from the total that I have got there. I think that is a matter of defence, which he should bring out hereafter, if it is his reliance.

The COURT: At present, I suppose all that Mr. Gowen wants to know, as I understand it, is to inquire how the statement was made up.

Mr. GLASGOW: That was the point to which he addressed me.

The COURT: Mr. Gowen may examine the witness, and then we will see as we go on just what is brought out.

By Mr. GOWEN:

Q. (Sheet shown witness.) That is one of the sheets to which you have been referring?

A. I think it is, yes.

By Mr. JOHNSON:

Q. They are all made on the same basis as that sheet?

A. Yes.

28 By Mr. GOWEN:

Q. Showing the distribution of cars made on June 2nd, 1902?

A. Yes.

Q. And the sheets for all other days, so far as you are aware, agree in form with this sheet that I have shown you?

A. Yes.

Q. They all agree with that?

A. So far as I know, yes.

Q. These sheets show what? The character of cars delivered at the various mines in that region?

A. They do.

Q. Just refer to the sheet. State what different kinds of cars were delivered there.

Mr. GLASGOW: I object. I am going to show by this witness the total number of cars. Mr. Gowen should take up the cross-examination of the witness regularly.

Mr. GOWEN: I want to show whether, in this statement he has prepared, he has shown the various kinds of cars, or whether he has massed them all together.

Mr. GLASGOW: That is what the statement shows, the total cars.

Mr. GOWEN: I want him to state that.

The WITNESS: That is what the statement says.

By Mr. GOWEN:

Q. What does this sheet show as to the character of cars delivered at the various mines in the Tyrone region on June 2, 1902?

Mr. GLASGOW: I object to that, because it is going beyond the point.

29 Mr. GOWEN: I want to show there were cars delivered of a different character.

Mr. GLASGOW: Don't you think that you should bring that out when you cross-examine my witness, after I am through with him?

The COURT: It is really a matter of indifference, I think, when it comes out.

Mr. GOWEN: Unless we know how this statement is made up, it is going to be very confusing to the jury, I am satisfied. I want them to understand how the statement was prepared.

Mr. GLASGOW: I will state, as Mr. Wigton has stated, that this statement is prepared and gives the total number of cars in the region each month for the shipment of coal.

Mr. GOWEN: If you will say in addition to that, that it includes the individual cars belonging to certain shippers, that it includes the fuel cars placed by the Pennsylvania Railroad Co. for its own supply, and fuel cars of foreign railroads, consigned to mines on the Tyrone Region for their supply——

Mr. GLASGOW: If that is a fact—I mean, if there are any such cars on the sheet, then our statement embraces those. It includes everything on the sheet.

The COURT: With that understanding, that is all you want at this point. Let us have a clear understanding about this synopsis of the summary, whatever it may be called, that the witness has in his hand. It is made up, as I understand it, from figures that appear upon the railroad distribution sheets, and from no other source.

Mr. GLASGOW: No other source.

30 By Mr. GLASGOW:

Q. These figures on the statement which you have in your hand, which I will subsequently offer in evidence,—this statement is made entirely from the figures on the distribution sheets for the period noted on that statement of the Pennsylvania Railroad?

A. It is.

By the COURT:

Q. And only from that source?
A. Only from that source.

By Mr. GLASGOW:

Q. And the statement under the head of "Total wooden cars in region," gives the total number of cars in the region, for the shipment of coal, or loading with coal, under the seven months set opposite to it, in wooden cars?

A. Under the heading "Total wooden cars in region" is the summary of the months—daily reports of the Pennsylvania Railroad Company, in which a wooden car is counted as one, and a steel car is counted as the equivalent of so many wooden cars. At one time, two wooden cars, and at another time one and a half wooden cars.

Q. Take, for instance, under the head of June 11th, 1902. There appears under the heading "total cars in region, steel, 1191. Others 5411," and under the heading "Total wooden cars in the region" is 7793. In order to arrive at that total, you multiply the number of steel cars, 1191, by two, and to that add 5411, other cars, making a total of 7793?

A. Yes.

Q. As wooden cars in the region?

A. That is the way it worked out, yes, sir.

Q. That is the way it is worked out, all through the statement?

A. It is; yes, sir.

31 Q. The actual number of cars in the region would be the number of steel cars, 1191, and the number of other cars, 5411, added together?

A. Numerically, that would be so.

Q. But the distribution of the Pennsylvania Railroad Company was made at that time on the basis of a steel car being equal to two wooden cars?

A. It was.

Q. And the 7793 represents the number of cars in the region in June, 1902, in terms of wooden cars?

A. It does.

Q. Taking for the month of June, 1902, you have given in that statement the percentage of rating and of cars received, and the total cars in the region, in wooden cars, and the shortage or excess which may have been received on the percentage, by the Berwind-White Coal Mining Company and by the Morrisdale Coal Company?

A. It is so shown.

Q. During the months of March, April and May, 1902, you were rated for car distribution at 4.2 per cent. for March, April and May. Is that correct?

A. That is correct.

Q. And part of May——

A. The rating appears to have been changed in the month of May.

Q. By which your rating was increased to 4.8 per cent.?

A. It was.

Q. During those months, March, April and May, you received all you were entitled to under your percentage of total cars in that region?

A. We did.

Q. And in excess of that?

A. And in excess.

Q. And loaded them?

A. We did.

Q. And shipped them?

32 A. We did.

Q. Let us begin with the month of June, 1902. The total wooden cars in the region during that month was 7793?

A. It was.

Q. Is that correct?

A. That is correct.

Q. And of that, under the percentage rating, what percentage were you entitled to?

A. 4.8.

Q. Is that from the distribution sheets of the Pennsylvania Railroad?

A. That is taken from the Pennsylvania Railroad distribution sheet.

Q. You received steel cars 88, and others 75, making a total of what, in wooden cars, received by you during that period?

A. 251.

Q. Based upon the total number of wooden cars in that region during that month, and your percentage of 4.8, how many cars were you entitled to—wooden cars, during the month of June, 1902?

A. 374.

Q. What was the shortage?

A. 123.

Q. 123 wooden cars less the difference you were entitled to receive under the percentage?

A. Under that percentage less than we were entitled to receive.

Q. And that is how many tons of coal that may have been shipped in those cars?

A. Equivalent to 3,075 tons.

Q. That is on the basis of 25 tons to the car?

A. It is.

Q. Is that the rating of the Pennsylvania Railroad Company of wooden cars?

A. Yes, that is the rating of the Pennsylvania Railroad Company.

33 Q. As to wooden cars?

A. Yes. It was at that time, 25 tons.

Q. In order to get at the total wooden cars which you were entitled to in the month of June, you take 4.8 per cent. of total wooden cars in the region?

A. That is the way it was calculated.

Q. And in order to get at the total wooden cars you received during that month, you take the steel cars, of which you received 88, multiplied by two, and to that result add 75 other cars which you did receive, making a total of 251?

A. We do, yes, sir.

Q. All of those figures as to cars received by you, and the percentage you are entitled to, are from the distribution sheets of the Pennsylvania Railroad?

A. They are made entirely from the distribution sheets furnished us by the Pennsylvania Railroad for inspection and the making of this summary.

Q. During the month of June, 1902, what was the percentage to which, according to the distribution sheets of the Pennsylvania Railroad, the Berwind-White Coal Mining Company was entitled?

A. 19.4, and changed apparently in the month to 19.3.

Q. Per cent?

A. Per cent.

Q. That is of total cars in the region?

A. Of total cars.

Q. Worked out upon the same basis, you worked out from the distribution sheets, the amount of cars which you received in that month, and the amount which you were entitled to, worked on the same basis, did the Berwind-White Coal Mining Company receive more cars or less in that month than they were entitled to under their percentage?

A. They received 197 cars in excess of their percentage.

Q. 197 in excess of their percentage?

34 A. Yes.

Q. And you received 123 less than your percentage?

A. We did.

Q. Beginning with the month of June, 1902, was there any improvement or decrease in the market conditions as to coal?

A. There was a very decided improvement, or increase, in the market value of coal, because the anthracite strike, which occurred in 1902, was beginning to make itself felt in June.

Q. And while, during the three months, March, April and May, you had gotten sufficient cars, beginning with June, did you, for the rest of that year, get what you were entitled to on the percentage basis as shown by the sheets of the Pennsylvania Railroad?

A. We did not.

Q. During each of seven months following June, 1902, to wit, July, August, September, October, November and December, 1902, have you worked out, upon the same basis as I have given to you as to June, the total shortage each month in cars and in tons?

A. We have.

Q. Which you received less than you were entitled to under your percentage?

A. We have.

Q. During each of those months you were short on the percentage to which you were entitled?

A. We were.

Q. Have you worked out on this statement the same for the Berwind-White Coal Mining Company?

A. We have.

Q. During the same months, June, July, August, September, October and November, 1902, was the Berwind-White Coal Mining Company under or above what it was entitled to under its percentage?

A. They were above what they were entitled to under their percentage, with the exception of the month of August, when they were three cars short of their percentage.

Q. For the month of June, how much were they in excess?

A. 197.

Q. July?

A. 226.

Q. The shortage in August was three?

A. Three.

Q. In September how much were they in excess?

A. 48.

Q. October?

A. 64.

Q. In excess?

A. In excess.

Q. November, in excess?

A. 466.

Q. December, in excess?

A. 364.

Q. Was the price of coal in the market increasing or decreasing?

A. Increasing very rapidly as the year advanced.

Q. For those months you have worked out on this statement, which I am going to offer in evidence, the number of tons you were short each month on the percentage that you were entitled to?

A. We have.

Q. Now, beginning with January, 1903. For January, 1903, were you in excess of, or short of the number of cars which you were entitled to under the percentage?

A. We were short.

Q. How much?

A. 10 cars.

The COURT: If I may suggest, instead of asking these questions, why does he not read the statement off, or let somebody else read it off? We will save a great deal of time in that way.

Mr. GLASGOW: I am not going to pursue this very long.

By Mr. GLASGOW:

Q. Then I will ask you, does this statement, for the period which you claim damages in this case, show the same comparison between the excess or shortage, as the case may be, of cars on percentage, furnished to your company and furnished to the Berwind-White Coal Mining Company?

A. It does.

Q. And is this statement correct, as far as the distribution sheets of the Pennsylvania Railroad Company show?

A. It is a summary of those distribution sheets.

Mr. GLASGOW: We offer this paper in evidence.

Mr. GOWEN: We object.

The COURT: It may be used. Strictly speaking, it is not an article of evidence, but I see no objection to it being used as a convenient summary.

Mr. GLASGOW: Mr. Gowen and I have an agreement that we may offer such statements, either side, from the distribution sheets, as I understand it.

Mr. JOHNSON: That is so; but we are objecting on the ground of its being incompetent.

Mr. GOWEN: We might as well, at this stage of the case, have this question met that we will have to meet before we get through, and that is, whether a statement of this character affords any basis whatever for determining the issues which are involved in the case.

The COURT: It is the same question to which you referred a moment ago?

37 Mr. GOWEN: Yes.

The COURT: I do not think I am in any position to determine it just now.

Mr. GOWEN: We object to the admission of this statement on the ground that it affords no basis for the ascertainment whether the plaintiff received, during the period covered by the action, the cars to which it was entitled under a proper system of distribution; and, secondly, we object to it upon the ground that the action is brought to recover damages resulting from the failure to deliver the proper number of cars during a given period of time, and that this statement picks out and is confined to certain months within that period and consequently, for that reason, not being a statement of the entire period covered by the action, does not afford a basis for the ascertainment of the number of cars which the plaintiff should have received, if any, in addition to those which were delivered to them; and is at variance also with the case as stated in the statement of claim.

Mr. GLASGOW: In what respect is it at variance?

Mr. GOWEN: The allegation here is (on page 2): "Plaintiff avers that the said failure to so deliver to the plaintiff its proper daily allotment of cars was continued throughout the years from the beginning of 1900 to the close of 1905, as above set forth"; and in the paragraph above that, "plaintiff avers that for a period beginning January 1st, 1900, and ending the last day of December, 1905, the Pennsylvania Railroad Company did," and so on, alleging that, during that period, they failed to deliver the cars to which plaintiff was entitled. The purpose, of course, of confining the statement to certain months is to enable the plaintiff to recover in this

38 action during a period of time when it received less, as it claims—although we do not concede that—than the number of cars to which they were entitled, and to deprive us from the benefit resulting from the over-supply of cars to the plaintiff dur-

ing the other months of the period; and, lastly, with reference to this statement, we do not wish to be understood, by confining our objections to the two points I have mentioned, to admit that the statement is a correct compilation from our distribution sheets, because that we do not concede.

The COURT: That third objection, of course, is one I ought to pass on immediately. If you do not concede its correctness, it is a matter for comparison.

Mr. GOWEN: We have submitted our statements, made up by the Audit Company of New York from the distribution sheets. They do not agree with the plaintiff's and we have not been able to reconcile the difference.

Mr. GLASGOW: The fact is, that this statement, as compared with the Audit Company's of New York, is slightly different, and on three different occasions—I do not mean to say it is Mr. Gowen's fault—but by agreement between him and myself, I have sent the man who made it up for us under the direction of Mr. Wigton, to the office of the Audit Cmpany of New York to see if that difference, which is slight in this statement, could be adjusted or reconciled. I have not been able to get it and I do not think Mr. Gowen has been able to get it, but I did not expect to be met today with any question as to the admissibility of the statement because of the slight difference between us. We have both been trying to get at
39 what the distribution sheets showed without bringing them here and figuring them out. The difference is very slight, as I understand it.

The COURT: What is the difference?

Mr. GLASGOW: I cannot tell, sir.

By Mr. GLASGOW:

Q. Do you know what it is?

A. I think it is in the neighborhood of 170 cars a month, in two or three instances.

Q. As to the total cars in the region?

A. As to the total cars in the region.

Q. Of which you were entitled to 4.1 or 4.2 per cent., so it means probably five or six cars a month, something like that?

A. Yes.

Mr. JOHNSON: He has, of course, the right to put his own compilation in, as a compilation, and we are going to put our compilation in. It does not throw it out on that ground. It is on other grounds we are opposing it.

The COURT: Then, if the third objection is out of the way, I will defer ruling on the objection until later in the case.

Mr. GLASGOW: May I draw your Honor's attention to one statement of Mr. Gowen's which might mislead you hereafter, unless it is corrected now—not that I want to say anything in rebuttal of it now, but simply that your honor may not be misled. The allegation in the claim is that the distribution was on daily allotment, not on periods of years, as Mr. Gowen seems to think. It was on daily allotment, and this statement is a compilation of the daily allotments.

Mr. Gowan has some proposition which he submits to your Honor, offsetting the days that he did not give us cars by the days
40 that he did; but we want your Honor to know that our view is that this is based on daily allotments.

By Mr. GLASGOW:

Q. There was a daily allotment of cars in the Clearfield region, was there not?

A. There was a daily distribution of the cars that came into the region.

Q. And a daily sheet kept?

A. There was.

Q. And this statement which I have offered is a compilation of the total excesses or shortages on the percentage of the daily distributions?

A. It is.

Q. For each month?

A. For each month.

Mr. GLASGOW: I offer this statement in evidence.

The COURT: As I understand, that percentage applies to each day?

Mr. GLASGOW: Yes, sir.

The COURT: And that for each day they were entitled to four and some tenths per cent. of the cars that were that day in the region?

Mr. GLASGOW: That is correct, sir.

Mr. JOHNSON: Our objection to it is this: his statement is that between point A and point B of time, we were short a certain number of cars. Now, he is not showing what we are short in cars between point A and point B, but he has picked out certain of them and says we were short a certain number at that time and, necessarily, does not therefore show that which his statement avers, to wit, his shortage between those two points. In other words, he has omited part of the factors.

Mr. GLASGOW: If your Honor will permit me to read:
41 "Plaintiff avers that the said failure to so deliver to the plaintiff its proper daily allotment of cars was continued throughout the years beginning 1900 to the close of 1905." Now this statement does not show that it did continue from 1900 to 1905, but it shows what days the daily allotment was less than we were entitled to, and, while we may not be able to recover for every day in that period, we are certainly entitled to recover for such daily allotments as were less than we were entitled to.

The COURT: I will defer ruling on it until a later period of the case.

Mr. GLASGOW: I do not know how to get along until we know whether the paper is in.

The COURT: I have not ruled on it as yet, at all.

Mr. GLASGOW: My difficulty is this, if this paper is not admitted in evidence, then I have to go to the distribution sheets and put them in.

The COURT: You can do as you have been doing. The witness has had the sheet in his hands for some time and has been examined on it without objection.

Mr. GLASGOW: I was trying to avoid taking it up item by item.

The COURT: I know you were, but you were met by an objection. It would seem to me that it is not an essential matter for the defence to exclude this statement, considering that they have their own statements based on a different proposition. It is not a vital matter, as it seems to me, whether it goes in or does not go in at this period of the case. That is only my suggestion. After all, the Court
42 will have to decide what theory is to prevail and then it will have to be calculated, and it cannot be for a moment imagined that the jury will remember all these figures.

Mr. JOHNSON: Why can we not put it in subject to your Honor's ultimate ruling? Let us put it in under objection, reserving exception or anything else, until your Honor's final ruling on it as to its legal effect.

(Statement admitted subject to defendant's objection. Marked "Pl. Ex. A, November 16, 1909, V. G. M.")

The statement is as follows:

Summary of Cars Placed in the Classified Region by Months, Taken from the Penna. R. R. Daily Distribution Sheets.

Month.	Total cars in region.		Total wooden cars in region.	BERWIND-WHITE COAL MINING COMPANY.							THE MORRISDALE COAL COMPANY.							
				% Rating.	Received.		Total wooden.	Entitled wooden.	Excess.	Shortage.	% Rating.	Received.		Total wooden cars.	Entitled wooden.	Excess.	Shortage.	Tons.
	Steel.	Others.			Steel.	Others.						Steel.	Others.					
March, 1902	779	4577	6135	23.3	124	1235	1483	1429	54		4.2	220	21	461	257	204		
April, "	1051	4934	7036	23.3	121	1387	1629	1639		10	4.2	277	36	590	295	295		
				23.3							4.2							
May, "	1223	5730	8176	20.1	229	1416	1874	1883		9	4.8	227	79	533	346	187		
				19.4														
June, "	1191	5411	7793	19.3	282	1147	1711	1514	197		4.8	88	75	251	374		123	3075
July, "	934	5716	7584	19.3	222	1245	1689	1463	226		4.8	86	122	294	364		70	1750
Aug., "	901	6143	7945	19.3	207	1116	1530	1533		3	4.8	143	47	333	381		48	1200
				19.3							4.8							
Sept., "	600	5668	6868	18.6	121	1103	1345	1297	48		5.1	71	76	218	341		123	3075
Oct., "	695	6446	7836	18.6	125	1271	1521	1457	64		5.1	77	115	269	399		130	3250
Nov., "	917	5148	6982	18.6	132	1500	1764	1298	466		5.1	62	109	233	356		123	3075
Dec., "	1046	5246	7338	18.6	143	1442	1728	1364	364		5.1	49	121	219	374		155	3875
				18.6														
Jan., 1903	921	4996	6838	16.2	118	1337	1573	1126	447		5.1	107	124	338	348		10	250
Feb., "	1214	4006	6434	16.2	194	1245	1633	1042	591		5.1	96	175	367	328	39		
May, "	1441	4878	7760	15.0	113	1249	1475	1164	311		4.7	57	231	345	364		19	475
June, "	945	4748	6638	15.0	125	1052	1302	995	307		4.7	36	257	329	311	18		
Jan., 1904	609	4354	5572	14.3	63	871	997	796	201		3.9	54	174	282	217	65		
Jan., 1905	412	4916	5740	12.4	67	1284	1418	711	707		5.1	27	205	259	292		33	825
				12.4							5.1							
March, "	412	6198	7022	10.8	50	1817	1917	817	1100		5.5	17	493	527	371	156		
May, "	465	5307	6237	10.8	36	1007	1079	673	406		5.5	32	386	450	343	107		
June, "	402	5198	6002	10.8	47	980	1074	648	426		5.5	27	283	337	330	7		
Sept., "	1343	4551	7237	10.2	71	1080	1222	738	484		5.5	28	302	358	398		40	1000
Oct., "	1661	5101	8423	10.2	166	1250	1562	859	723		5.5	48	304	400	463		63	1575
			3969	10.2			716	406	310		5.5			195	219			
Nov., "	1942	4747	3983	13.9	146	1213	748	551	197		8.0	36	383	249	317		24	2980
																	68	
Dec., "	2026	4834	7728	13.9	122	1245	1419	1074	345		8.0	35	362	412	618		206	7210

44 Mr. JOHNSON: Therefore we can, at a future time, raise our objection and your Honor will then pass on it?

The COURT: Yes.

By Mr. GLASGOW:

Q. I hand you a statement. During the month of June, 1902, how many tons of coal would you have been able to ship from your mines in excess of what you did ship, if you had received the number of cars which you were entitled to under your percentage?

A. 3075.

Q. More than you did ship?

A. More than we did ship.

Q. Have you had a statement made up, under your direction and from your books of your company, as to the cost per ton, including the royalty, which you paid to the landowners, for the coal which you took out under the lease—have you had made up a statement for the month of June, 1902, as to what it cost you to put your coal on the cars at the tipple?

A. I have.

Q. Will you please tell the jury what that figure was for the month of June, 1902?

A. The cost of the coal produced at those mines in June, 1902, including the royalty, was 97 cents a ton.

Q. On the cars?

A. Loaded on the cars ready for shipment.

Q. Did you, during the month of June, 1902, have contracts outstanding for the delivery of coal which it was necessary for you to fill?

A. We did.

Q. What kind of people were the contracts with?

A. Steamship companies, railroads and manufacturing companies in New England.

Q. You mean steamships——

A. Sailing from the port of New York.

Q. Liners?

45 A. Liners, yes, and freighters also.

Q. Was it necessary or not for them to have that coal?

A. They must have it, to get out of the port of New York. We were obligated to make the delivery.

Q. Did you, during that month of June, 1902, have to buy coal in order to supply the lack by reason of 3075 tons?

A. We did.

Q. Have you made up a statement from your books showing what that coal cost you per ton during that month that you bought it?

A. I have.

Q. Can you tell us what that was per ton?

A. $1.93 per ton.

Q. What is the difference between that amount and what it would have cost you to put it on the cars?

A. 96 cents a ton.

Q. And that, multiplied by 3075 tons, is $2952, the amount of damage you claim for that month?

A. We do.
Q. Is that correct?
A. That is correct.
Q. For the month of July, 1902, how much coal could you have shipped if you had had your pro rata proportion of the cars, over and above what you did ship?
A. 1750 tons.
Q. And during that month, what was the cost per ton of putting the coal on the cars at the mines?
A. 91 cents.
Q. Did you buy coal to fill contracts during that month?
A. We did.
Q. In the market?
A. We did.
Q. And paid the market price therefor?
A. We did; paid the market price.
46 Q. What was the price you paid?
A. $1.33 a ton.
Q. What was the difference between the two?
A. 42 cents per ton.
Q. And that multiplied by the 1750 makes $735, the amount you claim for damages for the month of July, 1902?
A. It does.
Q. On the same basis, how much damage do you claim for the month of August?
A. $696.
Q. Then for the month of September, 1902?
A. $5166.
Q. And for the month of October, 1902?
A. $9945.
Q. That was the period, was it, of the anthracite strike?
A. That was the period of the anthracite strike, and when coal was very high.
Q. It had increased in value?
A. Very much.
Q. And you were unable to get the coal from your mines?
A. We could not get it from our mines.
Q. In November, 1902, what is your damages on the same basis?
A. $6549.75.
Q. And for the month of December, 1902?
A. $13,368.75.
Q. In November, 1902, what is your damage on the same basis?
A. $622.50.
Q. During that period the price of coal had gotten very high in the market, had it not?
A. The price of coal had gone up very, very greatly, so much so that it was almost impossible to get it. Coal was brought from Great Britain.
47 Q. Were the people with whom you had the contracts holding you to them?
A. They were; demanding the fulfilment of them.
Q. Demanding the fulfilment of the contracts?

A. They were.

Q. Is it a fact that, during that period, there was a large amount of coal which you were not able to deliver and for which you had to pay damages?

A. We did.

Q. In addition to this amount?

A. In addition to this, yes.

(Adjourned until Wednesday, November 17, 1909, at 10 o'clock a. m.)

PHILADELPHIA, PA., WEDNESDAY,
November 17, 1909—10 a. m.

Present: Parties as before noted.

FRANK H. WIGTON, recalled.

By Mr. GLASGOW:

Q. In the statement which you have in your hand, which is your claim for damages in this case, during the month of June, 1902, you stated yesterday that the cost per ton to put coal on the cars at the Morrisdale mines amounted to ninety-seven cents a ton, including the royalty to the landowner?

A. It did.

Q. Explain to the jury what you mean by the royalty to the landowner?

A. The royalty is the amount paid to the landowner, based on a certain amount per ton, on coal that is taken from the mine—that is, rental or royalty.

Q. You are the lessee of the land out of which you take the coal?

A. Yes, we were.

48 Q. That is the amount per ton that you have to pay to the landowner?

A. That is correct.

Q. And during that same month, you charge that the cost of the coal you bought, 3075 tons, in order to supply the coal—to fill your requirements during that month, was $1.93 per ton?

A. Yes.

Q. A difference of ninety-six cents?

A. Yes.

Q. $1.93, is that the average price of the coal which you used to take up that 3075 tons during that month?

A. It is the average price.

Q. Can you state whether or not the market price of coal during that month of June, 1902, was as high, or not as high, as the highest amount you took in making the average?

A. It was fully as high. All that coal was bought either by myself, or under my instruction or supervision, and very naturally I was not paying any more for coal than I could avoid. I bought the coal at the lowest possible market price.

Q. You had some coal for delivery to you, during that month, and which you paid for during that month, which was less than the

price of the market price of coal during that month, and which coal you applied to this deficit?

A. That is true, because I had made some arrangements for coal prior to the month of June to be shipped and delivered in the following months of the year, and that price, owing to market conditions before June, was lower than the price that ruled in the market after June, but in making the average, that was given in there to reduce the general average.

Q. And, therefore, as I understand you, during the month of June, you gave to the defendant the benefit of such coal as
49 you got and paid for during that month, which was less than the market price during that month, and which coal you applied to this deficit of 3075 tons?

A. We did; because it seemed the only fair way was to take the average of all coal purchased during the month, to reach the average cost.

Q. In making up the statement that you have in your hand, is that the way that you made up the statement for the months mentioned thereon in 1902, 1903 and 1905?

A. Yes, the same way.

Q. As I understood you yesterday, there were periods during that complete period from 1902 to 1905 when you got more cars than the percentage which was awarded to you, would have entitled you to?

A. Yes.

Q. Can you explain how that would happen—how it would happen you would get more cars?

A. The excess in the car supply is shown upon the sheet which is compiled from the Pennsylvania Railroad records, which they furnished us, and the excess car supply undoubtedly happened because at certain periods other operators in that district either could not use the cars or did not want them, and therefore the railroad company had sufficient cars to meet the askings of those who did need them, and as we were constantly asking for more cars than our percentage, they put them up there to be loaded, and we loaded them and sent them out.

Q. When, in the region, certain operators do not need the cars which they are entitled to under their percentage, the rule is, that the railroad company distributes those cars to the people who can load them in addition to the percentage they are entitled to, is it?

A. Yes. The railroad company will give the operator asking for more, any number that he wants, if they have them, after the other people are supplied.

50 Q. And if a man can load cars, the railroad company gives him the cars that the other people do not load or cannot load, or do not want to load, in addition to what he is entitled to under his percentage?

A. They do.

Q. During the period you got the excess of cars, was the market price of coal as high or lower than at the time when you were short of your percentage of cars?

A. Very much lower, because the market is affected—it is an evidence of it being affected when the cars become scarce.

Q. Then this statement, amounting to $43,290.45, which you have told the jury how it was made up—is that a correct statement from your books?

A. That is correct, as taken from our books.

Q. Does the amount of tonnage which you may raise and ship from the mine affect in any way the cost of the amount that is mined?

A. Very materially.

Q. In what way?

A. If a mine is equipped to produce 1,000 tons a day, with all the necessary appliances and the necessary men, who are paid monthly wages, then, if you produce 1,000 tons per day, you have mined your coal under the basis of estimated cost, which would be the minimum cost of production. But if your output is limited, and reduced to 500 tons per day, all the dead work, or fixed charges, must be divided by the 500 tons, in place of being 1,000, and that makes a very decided increase in cost, or making up the difference between profit and loss.

Q. There are fixed charges which must be paid, no matter whether the tonnage is 100 tons or 500 tons?

A. There are.

Q. And if you distribute the expense over a larger tonnage, it necessarily reduces the cost per ton. Is that right?

A. It does, yes.

51 Q. Have you figured out an estimate, or so far as you can do so, accurately, what your loss per ton upon the entire tonnage which you would have been able to ship, if the railroad company had furnished the cars you were entitled to—what amount per ton the additional tonnage would have decreased the cost to you?

A. I have. I have taken the amount of coal produced on the cars furnished, and therefore that amount shipped, and considered the amount of coal which would have been shipped in addition to that, had the proper proportion of cars been furnished. Putting the two together, the difference in cost, under the method of working which was enforced upon us, would be equivalent to a minimum of five cents per ton, which amounts to something like eighty-three hundred dollars. The reason for that is, that in the coal which was produced, all the dead work charges are included, and the coal which would have been produced had the other cars been furnished, would not have cost the average which the sheets show the coal did cost, because there would have been no charge to add to that amount of tonnage, except what we know as miners' wages, the digging of coal, the hauling of the coal, and loading it on the railroad cars. All the other charges remained the same, and they were included in the amount of coal which was purchased and shipped, and therefore that cost was enhanced to the extent of something like $8300, five cents per ton.

Q. Is that estimate of five cents per ton a fair one?

A. I should say it was a very conservative estimate.

Q. Indicate some illustration of what the fixed charges that you speak of are, what department of the work, no matter what amount of coal you may raise?

A. You take the Morrisdale shaft No. 2, which is covered in this.
52 The pumps have to be run constantly, seven days in the week and twenty-four hours in the day. It takes about 1,000 tons a month to run those pumps, whether you are working or whether you are standing. That coal costs us about $1,000 to produce and burn right there. Then the men in charge of the pumps must be at work whether you are standing or whether you are running, the engineers, the firemen, the superintendents, your mules, and your machinery has to be kept up, whether it is in use or idleness and your mules have to be fed, whether they are standing in the barn or whether they are at work. It costs just as much to feed them when they are idle as it does when they are at work, and those are what we call items of fixed expense, or fixed charges.

Q. Those are the illustrations that you mean by that?

A. Yes.

Q. That makes the total of your damage during the months covered by this statement of $51,640.60?

A. Yes, it does.

Q. Then on the next page is a calculation of the interest on each of those sums from the time of the breach by the defendant company. Is that correct?

A. It is.

Q. Making a total of $69,256.09?

A. That is correct.

Mr. GLASGOW: We offer that statement in evidence.

Mr. GOWEN: I suppose your Honor will prefer to allow this to go in subject to the objection?

The COURT: Yes, of course.

Mr. GOWEN: As to whether this affords any basis?

The COURT: It is a synopsis, and its accuracy is substantial. I suppose it may be used for the same purpose as the books would be used if the books were here.

53 The statement is as follows:

The Morrisdale Coal Co.

PHILADELPHIA, *Nov.* 16, 1909.

The Pennsylvania Railroad Co. to The Morrisdale Coal Co., Dr.

Claim for loss by reason of not receiving sufficient cars as ordered, based upon our percentage of cars placed in the Clearfield Region:

1902.							
June.....	3075	tons as per statement			1.93		
					.97	.96	2952.00
July.....	1750	"	"	"	1.33		
					.91	.42	735.00
August.....	1200	"	"	"	1.54		
					.96	.58	696.00
September....	3075	"	"	"	2.75		
					1.05	1.68	5166.00
October.....	3250	"	"	"	4.13		
					1.07	3.06	9945.00
November.....	3075	"	"	"	3.21		
					1.08	2.13	6549.75
December.....	3875	"	"	"	4.49		
					1.04	3.45	13368.75
1903.							
January.....	250	"	"	"	3.63		
					1.14	2.49	622.50
May.....	475	"	"	"	1.29		
					1.14	.15	71.25
1905.							
January.....	825	"	"	"	1.07		
					1.19		
September.....	1000	"	"	"	1.13		
					1.08	.05	50.00
October.....	1575	"	"	"	1.13		
					1.07	.06	94.50
November.....	2980	"	"	"	1.28		
					1.01	.27	804.60
December.....	7210	"	"	"	1.41		
					1.10	.31	2235.10
							43290.45

1902.										
June	6,366	Tons	shipped	from	Morrisdale,	Mabel	&	Madeira	Mines	
July	7,958	"	"	"	"	"	"	"	"	
August	8,508	"	"	"	"	"	"	"	"	
September	5,367	"	"	"	"	"	"	"	"	
October	6,374	"	"	"	"	"	"	"	"	
November	5,909	"	"	"	"	"	"	"	"	
December	5,852	"	"	"	"	"	"	"	"	
1903.										
January	8,981	"	"	"	"	"	"	"	"	
May	11,149	"	"	"	"	"	"	"	"	
1905.										
January	9,047	"	"	"	"	"	"	"	"	
September	11,835	"	"	"	"	"	"	"	"	
October	14,703	"	"	"	"	"	"	"	"	
November	16,069	"	"	"	"	"	"	"	"	
December	15,270	"	"	"	"	"	"	"	"	
	167,003	Tons at 5c.								8,350.15
										51,640.60

To interest from	July	1,	1902,	to	November	16,	1909,	on	2,952.	1,306.26
" " "	Aug.	1,	1902,	"	"	"	"	"	735.	321.56
" " "	Sept.	1,	1902,	"	"	"	"	"	696.	301.02
" " "	Oct.	1,	1902,	"	"	"	"	"	5,166.	2,208.46
" " "	Nov.	1,	1902,	"	"	"	"	"	9,945.	4,201.76
" " "	Dec.	1,	1902,	"	"	"	"	"	6,549.75	2,734.51
" " "	Jan.	1,	1903,	"	"	"	"	"	13,368.75	5,514.61
" " "	Feb.	1,	1903,	"	"	"	"	"	622.50	253.66
" " "	June	1,	1903,	"	"	"	"	"	71.25	27.61
" " "	Feb.	1,	1905,	"	"	"	"	"	.....	.....
" " "	Oct.	1,	1905,	"	"	"	"	"	50.	12.37
" " "	Nov.	1,	1905,	"	"	"	"	"	94.50	22.92
" " "	Dec.	1,	1905,	"	"	"	"	"	804.60	191.09
" " "	Jan.	1,	1906,	"	"	"	"	"	2,235.10	519.66
										$69,256.09
									Credit by error	2,100.00
										$67,156.09"

55 By Mr. GLASGOW:

Q. You had contracts, as I understood you yesterday, which required the delivery of coal during each month during this time?

A. We did, contracts for delivery in the port of New York, and places in New York City and New England, which were the ones that were principally covered by this shipment.

Q. In those contracts was it necessary to have daily deliveries of coal to comply with the requirements?

A. Daily, weekly and monthly. Some required so much per day, some so much per week, and some so much per month.

Q. What I mean is, was it necessary, in your business, that there should be a regular daily supply of cars?

A. It is necessary—absolutely essential for the conduct of such business.

Cross-examination.

By Mr. GOWEN:

Q. Will you please state again, for I do not recall, as I have not the notes of testimony before me, which of your mines were shipped over the Pennsylvania Railroad?

A. What we know as Morrisdale No. 2 shaft, Mabel, and during a portion of this time the Madeira. We had also mines in another district, known as the Broad Top mines.

Q. And in your direct examination you stated, as I recall it, that the shipments from the mines which you have just mentioned, were made exclusively over the Pennsylvania Railroad?

A. The shipments from those mines were made exclusively over the Pennsylvania Railroad.

Q. You recall testifying, do you not, before the Inter-
56 state Commerce Commission two or three years ago, in connection with an investigation which was conducted into the method of conducting the coal trade—the coal business of the Pennsylvania Railroad?

A. Yes, I remember the circumstances.

Q. Let me read you from the notes of testimony that you gave there, and say whether, in view of what you then stated, that you are correct in what you stated here:

"Furthermore, quite a good deal of coal mined at the Morrisdale No. 2 is transported under ground, by reason of lack of car supply of the Pennsylvania Railroad, and lifted at No. 2 and shipped over the New York Central, and, although No. 2 might be reported as working today, it would not necessarily be shipping coal over the Pennsylvania Railroad."

A. Possibly I did.

Q. That is a correct statement?

A. Possibly. It is fair that I should explain that thing. The Morrisdale property consists in all of some 5,000 acres. The New York Central Railroad approached it on one side, and there are two shafts or openings on that. No. 1 shaft is about a mile away from No. 2 shaft, which is located on the Pennsylvania Railroad. There is no

connection with the New York Central Railroad from No. 2 shaft at all. The coal that is produced in the other property underground, in mining, is taken out of these three openings, one on the Pennsylvania, and No. 2—two openings on the other, the Pennsylvania Railroad Company giving us a rating for what is known as No. 2 shaft, which mines the other section of that property, and while it is possible that coal might be hauled from that same territory a mile and loaded on the New York Central tracks, it is done at increased cost, and is only done for the purpose of reducing the expense during a time of idleness, and if No. 2 shaft was
57 working, and digging coal at a time when the Pennsylvania Railroad Company did not furnish a sufficient number of cars, the result of that is to reduce the general cost of what coal was produced at No. 2 shaft, and thereby giving the Pennsylvania Railroad Company on this account the advantage of that condition, because if it had not been working, the expense by reason of the idleness would have increased that cost. It is true that the coal may have been taken across and loaded at the other, and worked in that way.

Q. Is it not true that the coal was taken across?

A. Yes.

Q. Frequently?

A. How frequently I do not know.

Q. But quite frequently?

A. When the Pennsylvania Railroad Company did not furnish the cars, we would do it, whenever we had the facilities to take it.

Q. When the Pennsylvania Railroad Company was not furnishing cars, you took that coal from No. 2, underground, through No. 1, and raised it out of No. 1, and shipped it by the New York Central?

A. A portion of it. Not all of it. A portion of it.

Q. Will you tell us what it amounts to in tons?

A. I could not say the number of tons, because it would depend upon the conditions under ground surrounding the No. 2 shaft.

Q. In the testimony which you gave before the Interstate Commerce Commission, to which I have just been referring, did not you testify to this effect This testimony was given in May, 1906, was it not?

A. I do not recall the time.

Q. About that time. Referring to the condition of affairs existing in the Clearfield region, in which your mines are located, did not you testify as follows:

"After much pressure upon the Pennsylvania Railroad Company they once or twice issued orders to give us ten cars a day,
58 which was kept up at intermittent periods for a month at a time, possibly, and finally was rescinded entirely. That condition of affairs has been going on the past three or four years and because of it, particularly in the Clearfield region, is due to the fact that, first, is taken into that district cars for their supply coal, which are not counted in the distribution; second, individual cars for certain operators, which fully meet the requirements of those operators in that district, and they are not counted in the distribution, or at

least they were not prior to the first of this year; third, they accept cars from foreign railroads such as the Delaware & Hudson, the Boston & Maine, the Lehigh Valley and the Philadelphia & Reading, and they were placed in that region and not counted in the distribution. So, by the time all those cars were in the region, they had facilities enough to take in for distribution about fifty cars a day, and those were divided around supposedly on the percentage basis, which gave us some three or four cars a day."

Do you recall that testimony?

A. In the main, I have no doubt that is correct.

Q. You have no doubt that that was a correct description of the conditions existing in the Clearfield region during the three or four years?

A. As I have described it, to the best of my knowledge, at that time.

Q. Preceding your giving of this testimony.

A. Yes, sir.

Q. What were those foreign cars you were referring to—the Delaware & Hudson, the Philadelphia & Reading, the Lehigh Valley and others—what were they sent in for?

A. Sent in for coal.

Q. Were they not sent in for the supply of coal to those railroad companies?

A. That I do not know.

Q. You know that is largely true, do you not

59 A. From rumor and hearsay, yes. From my knowledge, no, sir.

Q. From your knowledge of the conditions prevailing in the Clearfield region, don't you know that these foreign railroad cars which got into the Clearfield region were mainly, if not wholly, sent there for the supply of coal of the railroad owning the cars?

A. Answering that question from the same source, knowledge which is current report and general information of the trade, there were a great many Boston & Maine Railroad cars sent into the Clearfield region, ostensibly for the supply of coal of the Boston & Maine Railroad, but a large portion of them were used for commercial purposes by one coal man, who seemed to control the supply of the Boston & Maine Railroad cars, that were sent into the Tyrone and Clearfield region.

Q. You have spoken of the Boston & Maine. How about the Delaware & Hudson River, the Lehigh Valley and the Philadelphia & Reading?

A. The same party seemed to have entire control of the Delaware & Hudson cars.

By Mr. GLASGOW:

Q. What party is that that you are speaking of?

A. J. J. Childs Coal Company, Lansenburg, New York. It was understood that they were so closely allied with the Delaware & Hudson people that they had a very good reason for having control of those cars.

Q. Those cars were received by the Pennsylvania Railroad Company, consigned to certain mines to be loaded, apparently, with a supply of coal for those companies, were they not?

A. I always understood so.

Q. That was true also of the Philadelphia & Reading and the Lehigh Valley cars?

A. No, sir; it was currently reported that the Philadelphia
60 & Reading cars that were placed on the Pennsylvania Railroad were controlled by one coal operator, and although they were placed there for the purpose of the Philadelphia & Reading supply of coal exclusively, they were largely used for commercial purposes on the Reading road. I am only giving it to you as it is generally understood or was understood in the coal trade. As to its correctness I do not know.

Q. But they were received by the Pennsylvania Railroad Company, consigned to certain mines, to be loaded with a supply of coal, and if they were used as you say they were after they got on the Philadelphia & Reading tracks, that was something that the Pennsylvania Railroad Company could not control?

A. Very likely not.

Q. In the statement which you have prepared, which purports to show a number of cars for distribution in the region—in the Clearfield region, and the number of cars received by you during certain months, you have included both the cars of the Pennsylvania Railroad Company, the individual cars or private cars of operators in the Clearfield region, and these foreign railroad cars?

A. We have included all the cars that were placed.

Q. Did I understand you yesterday to say that you had been satisfied yourself as to the accuracy of that statement?

A. I have checked over a large number of those daily reports of the Pennsylvania Railroad Company, in the Pennsylvania Railroad Company's offices with the man who actually made the first compilation.

Q. But you did not, of course, undertake to check every date?

A. Not every one, no. I am not positive even now whether I did not go through the fifteen months that is covered by this, and that was brought about by the Pennsylvania Railroad Company presenting a statement made by the Audit Company of New York,
which showed a difference, which, in the aggregate, was not
61 large, amounting to some 180 cars in the month, and in an effort to find out where that was, and detect the discrepancy, I called on the man who did the work for us, and checked over probably all of the months covered by this—at least, a great many of them, and found them to be correct.

Q. That statement you had prepared covered the entire period from March, 1902, to the end of 1905, did it not?

A. No. I am speaking now from memory. I think it did not take in 1904, upon which year we have no claim.

Q. But it took in all the months except January and February, 1902.

A. You are referring now——

Q. I am not referring to the statement you produced in court, but the statement you had prepared by the man who you delegated to make up the statement from our distribution sheets?

A. I think it takes in all of that time.

Q. Every month?

A. Yes.

Q. From March, 1902, to the end of the year 1905?

A. I cannot speak for 1904. The records are here to show for themselves.

Q. And in the statement which you have submitted here, and from which you have been testifying, you have excluded the months of March and April, 1903, and July and August——

A. 1903.

Q. Yes.

A. Yes.

Q. March and April, 1903, July, August, September, October, November and December, 1903?

A. Yes.

Q. And all of 1904 except the month of January?

A. Yes.

62 Q. And the months of February, April, July and August of 1905?

A. That is right.

Q. Those were excluded, because in all those months you had cars in excess of the percentage you were entitled to?

A. Yes; in some quite a large excess and in others just a little, a trifle, but always an excess.

Q. You stated, as I understood you, in answer to a question of Mr. Glasgow, that the excess of cars which you got in those months was due to the fact that other operators in the Clearfield region got all they wanted, and the excess cars delivered to you were cars which the railroad company could not place elsewhere. You did not mean to say that, did you?

A. Not quite as you have placed it.

Q. I may have misunderstood you.

A. If you will allow me to repeat. My understanding of the reason why the Pennsylvania Railroad Company would give us this excess number of cars during this period of time, was, that either other operators were fully supplied, or did not want them. I knew of no other reason why we would get any excess of cars in that period of time for those reasons. If there were any other reasons, they were unknown to me.

Q. You do not know anything about the demand of other operators, as to whether they had all the cars they wanted?

A. I only know that in the general working of the business, if the Pennsylvania Railroad Company gave an excess in cars, it was because they had them to give, and because others had received all they wanted. I do not know of any other cause for it.

Q. You do not suppose it was due to the fact that in one month you might have gotten a deficiency, and that deficiency was made up to you in the next month?

A. No, I do not.

Q. Do you not think that is reasonable?

63 A. No, I do not think it is reasonable, because the making up of what occurred last month in shortage would not make up the trouble that arose, the loss that arose. They may have been doing that, but it is not known to me.

Q. Will you be kind enough to mention any operators whom you know of, who, during the months that you received this excess in cars, had all the cars they wanted?

A. I could not mention any operators, for I do not know them. I am only speaking of my general knowledge of the working of the coal business.

Q. Is what you have stated anything more than an inference on your part, based solely upon the fact that in these months you did get more cars than your percentage?

A. It is only an inference on my part that we had cars placed wherever somebody did not load them, in excess of other requirements.

Q. You do not think the excess of cars was at all to be ascribed, to what I have already read to you, as to what you stated before the commissioner, that "After much pressure upon the Pennsylvania Railroad Company, they once or twice issued orders to give us ten cars a day." Was not that an arbitrary allotment of cars to your mines in excess of your percentage?

A. Prior to June, 1902—I think it was in 1901—probably in 1900—after repeated interviews with the officials of the Pennsylvania Railroad Company, in which our position was shown to be very peculiar, and in which the officials of the Pennsylvania Railroad Company replied to me repeatedly, "Your position is unique; we know you are suffering; we would like to do something to assist you, but how can we do it?" In 1901, I think it was, or probably the early part of 1902, acting under the instructions of the vice-president of the Pennsylvania Railroad Company, some ten cars a day were given to us arbitrarily. They would come for a

64 few days, then they would stop. I repeatedly said to the vice-president, and also to the general manager, or superintendent—the manager of transportation—"This is doing business under favors. I never know where I stand. I come down tomorrow with cars, and the next morning they are gone. I do not want to do it that way. We are entitled to our percentage of what goes in there, and we must suffer if you cannot spare the cars, but we are certainly entitled to our proportion of all the cars that go into that district, and while it is very nice to have these ten steel cars every day, you can see that there is constant uncertainty there; you cut them off any day at all, if you want to do so, and I would rather you did not do it, but give us what I am entitled to have. Under your basis of distribution, it will require about 1,000 cars a day to be placed there. Give us our percentage to run our collieries full. You know you never did place them, and you could not place them, and you will admit to me that you could not haul them if you did place them." All of it was admitted by the officials of the Penn-

sylvania Railroad Company. Subsequent to about June I have no recollection of having received any special assignment of cars at all. If there were, it is out of my recollection.

By Mr. GLASGOW:

Q. What year was that? Subsequent to June of what year?
A. 1902.

By Mr. GOWEN:

Q. Do not you recall that similar instructions were issued in January, 1905, and that for some months following that you got an arbitrary allotment of cars?

A. No, I do not decall that. If the records would show it, it may have been. I cannot recall anything of that kind.

65 Q. When did your company become the owner of individual cars?

A. I think it was in January or February, 1903, and the way those individual cars came to be placed——

Q. You became the owner of individual cars in the early part of 1903?

A. I think that time, or thereabouts.

Q. Did not you farm out those individual cars to other mines than your own?

A. We did place some individual cars at other collieries from which we bought coal.

Q. That practice continued all through the years 1904 and 1905, did it not?

A. I cannot say how long it continued, but we did do it. I do not know just how long it was.

Q. How many individual cars were there?

A. 150.

Q. What were they, wooden or steel cars?

A. Wooden cars.

Q. Would you be surprised if in those years 1100 of those cars were placed at other mines than your own?

A. Not necessarily. In what years? 1903 and 1904?

Q. Yes.

A. We have no reference to 1904 in this matter at all, and 1100 cars would ordinarily be those cars that were making two trips and a half a month.

Q. But they do not?

A. And that would be equivalent to about three months' running. I would not be surprised if in 1903 and 1904, especially in 1904, when we were out on strike, for four or five months by reason of differences between the miners and ourselves, when this number 2 shaft was shut down, we were buying coal elsewhere and running our own cars to secure the coal.

66 Q. But the placing of these cars at other mines was not confined to the strike period? The placing of your cars at other than your own mines was not confined to the period of the strike? It extended through the years 1903 and 1904. Did it not?

A. I do not know just over what period of time?
Q. Can not you tell from some records?
A. We could probably from looking up the records, yes.
Q. Suppose you do that and let us have that statement?
A. Sure, I will have it looked up for you.

By Mr. GLASGOW:

Q. What record have you of that?
A. The only record that we have of that would be the shipments of coal that were purchased, and it might show our individual cars were placed with those people, and they used them. I am not sure that our records will show that, but we will do our best to look it up and find out about it.

By Mr. GOWEN:

Q. Describe very briefly, so that the jury may understand, the method pursued by the railroad company of actually making the distribution of cars at the various mines throughout the region, how often in each day is that distribution generally made—how frequently each day is the distribution generally made?
A. The distribution ordinarily is made once a day, in the morning, although they sometimes, I believe, ran trains to us in the afternoon. Usually it is once a day.
Q. And under the practice which prevails up there, you are obliged to regulate the output of each mine daily for the number of cars which are placed for loading?
A. Whatever number of cars are placed for loading restricts the output, and a difficulty sometimes arises that the railroad company places cars for us in the morning at eight or nine o'clock,
67 and sometimes it is afternoon, and if there are no cars left over from the placing of the day before, to start to work at seven o'clock in the morning, you can't ask a crew of men to remain in idleness waiting for cars that may not be placed until later in the day, and their irregular hour of placing cars sometimes results in a day's idleness that might not have arisen had they placed them more regularly, but the usual method is to come as early in the morning as they can.
Q. Are you correct in stating that 98 or 99 per cent. of your business during the period covered by this action was interstate business—that is, shipment to points outside the State? Was it as great as that?
A. I should think that, because our business within the State of Pennsylvania is practically nothing; very small.
Q. That is a very different condition from that which prevails in the Clearfield region generally, is it not?
A. That I do not know, as to where other people may be placing.
Q. But from your general knowledge, is it not a fact that probably from one-fourth to one-third of the shipments originating in the Clearfield district go to points in the State?
A. No. I would not like to speak with any degree of definiteness as to the quantity. I do not know. I only know as to ourselves.

Q. It must be a substantial proportion?
A. I should think so, but I do not know the quantity.
Q. In the statement which you read from yesterday, you embraced not only the cars placed in the Tyrone region as a whole and the cars which had been delivered to your mines, but you also included the cars which had been delivered at the Berwind-White Coal Mining Company's mines, did you not?
68 A. All cars delivered at all mines in the Clearfield region, as taken from the sheets.
Q. You also singled out the Berwind-White Company's mines for especial consideration?
Mr. GLASGOW: For comparison.
The WITNESS: We did it only for comparison. That is all.

By Mr. GOWEN:

Q. When the figures were presented to you by your accountant, who took them from our distribution sheets, which showed the number of cars delivered at the Berwind-White Coal Company's mines, those figures showed you, did they not, the number of fuel cars which had been placed at those mines, the number of Berwind-White Company's own individual or private cars, and the number of the Pennsylvania Railroad system cars?
A. The Pennsylvania Railroad sheets showed the specific kind of cars as placed. In making up our sheet we put everything together.
Q. You are not in a position to say, as I understand, what proportion of the cars delivered to the Berwind-White Company's mines was fuel cars from the Pennsylvania Railroad's own supply, and the individual cars of the Berwind-White Company?
A. No, I could not say, without reexamining those daily reports of the railroad company.
Mr. GLASGOW: I do not know whether they show that.
The WITNESS: I think they do.

By Mr. GOWEN:

Q. You know the method of purchasing fuel coal which has been in force for a number of years on the Pennsylvania Railroad Company's lines? I mean by that, you know the coal is bought from the operator at the mines. That is the fact, is it not?
69 A. Yes, sir; I so understand it.
Q. The Pennsylvania Railroad Company fixes a region price, and that price is paid for the coal delivered in cars at the mines, the Pennsylvania Railroad furnishing the cars?
A. I so understand.
Q. Coming to the question of the coal which you state you had to purchase in order to enable you to fill the contracts which you had entered into, which could have been supplied, in whole or in part, I suppose your contention is, from the coal that you could have shipped from these mines, had you had the cars. Commencing with the month of June, 1902, you have stated that you purchased in that month 3,075 tons?
A. Yes, sir.

Q. And your claim is that you are entitled to hold us liable for the difference between the cost which you would have incurred had you produced that coal, and the cost that you were put to in purchasing it?

A. That is correct.

Q. That 3075 tons was only a small part of your total coal purchased for that month, was it not?

A. That is possible. No, it is not a small part. It is a part, but whether it covers the total purchase—I do not think it does.

Q. It appears, unless I have misunderstood the books, that I was in error in assuming that in the month of June you purchased more than 3075 tons. What does this book show your purchases during that month were of coal?

A. This book would show that the total purchases as shown from other people were 2063 tons, but there was coal taken from other mines on the New York Central Railroad *Company* to fill up the deficit which arose through the lack of car supply here.

Q. Coal mined at your own mines?

A. Yes, sir; robbed Peter to pay Paul.

Q. Then in point of fact, although, in this statement you
70 have submitted, you have sought to charge us with the price of 3075 tons purchased as you say at the average price of $1.93, in point of fact your entire purchases during that month amounted to only 2063 tons?

A. Our purchases from outside parties, but we were deprived from selling coal which came from other mines on another railroad.

Q. The Morrisdale Coal Company cannot purchase from itself coal which it mined itself, can it?

A. In one sense, yes. It can be estopped from selling coal at a profit if it is obliged to fill it somewhere else, through a lack of someone supplying the cars.

Q. In the month of July, 1902, this book shows purchases of 5116 tons, and you seek to charge us with the cost to which you were put in purchasing 1750 tons?

A. Yes, sir.

Q. Of that 5116?

A. Yes, sir.

Q. Why was it necessary for you to purchase so much as 5116, when, according to your own claim, you were only deprived of shipping 1750 tons?

A. Our purchase of the excess above 1750 tons was in the ordinary course of business and had nothing to do with the Pennsylvania Railroad Company being short in their car supply to us to the extent of 1750 tons.

Q. In other words, you bought the coal for the purpose of reselling it at a profit?

A. Either that, or putting it in our bins—yes, reselling it at a profit.

Q. This book shows that through the balance of the year 1902 your purchases of coal in each month, compared with the amount

which you claim you were unable to ship from your own mines due to shortage of cars, were as follows:

71 August, purchased, 8107.
Shortage claimed, 1200.

A. If that shortage is correct.
Q. September, 7596. Shortage claimed, 3075?
A. Yes.
Q. October, purchased 12,340 tons?
A. Yes.
Q. Shortage claimed, 3250 tons?
A. Yes.
Q. November, 10,357 tons purchased?
A. Yes.
Q. Shortage claimed, 3075?
A. Yes.
Q. December, 13,955 tons purchased?
A. Yes.
Q. Shortage claimed, 3875 tons?
A. Yes.
Q. May we conclude that what you have said as to July and August purchases applied equally to purchases throughout the balance of the year?
A. Yes; that is correct.
Q. In other words, all this coal was purchased to be resold?
A. No, all of this coal was purchased—a portion of it to fill contracts that we were obligated upon, and I suppose any surplus, if there was any, was to be sold again at a profit.
Q. In November, 1905, you charge us in this statement which you have prepared, with the cost of purchasing 2980 tons at $1.28 a ton. Is that right?
A. You have the record. I have not it here. 2980 tons, but the price per ton I have not.
Mr. GLASGOW: It is underneath here, I think.
The WITNESS: November, 1905, $1.28. That is right. I did not know I had it on the statement here. This is summarized here. I did not know I had it.

72 By Mr. GOWEN:

Q. How much coal did you purchase actually in that month?
A. November?
Q. Yes.
A. 1335 tons from outside parties, and it took the balance to fill our obligations from mines on other railroads.
Q. In December, 1905, you charge us with the cost of purchasing 7210 tons at $1.41?
A. Yes.
Q. How much coal did you purchase in December, 1905?
A. 2714 tons from outside parties, and it took the balance to fill our obligations away from other trade on other railroads.
Q. You took the balance in both months from coal mined at the Morrisdale mines?

A. Not all Morrisdale. From other places.

Q. The coal mined by the Morrisdale Coal Company?

A. Yes, sir.

Q. You have spoken of contracts which you were under obligation to fill during this period. What contracts were those?

A. Such contracts as steamships——

Q. I do not mean the character of the contracts. With what parties had you contracted to furnish coal, who you were obliged to make deliveries to during this period

A. The Clyde Steamship Company, the Phœnix Line, and a subordinate company of the United Gas Improvement Company, delivered in Connecticut, and very many foreign owners. We had contracts to the extent of probably one hundred to one hundred and thirty, and other mines that for the moment I cannot recall—steamship people.

73 Q. Is it not a fact that you sold during this period at high prices a very large part of your output, at those high prices?

A. No, sir. It is a fact that the Morrisdale Coal Company at the termination of their year, after going through a period of excessively high prices in the anthracite strike, showed a very heavy loss of money, not having made one cent out of the increased prices.

Q. Do you mean to say you sold no coal at the high prices prevailing, and you delivered all the coal which you mined—which the Morrisdale Coal Company mined, during this period of high prices, under contracts to persons to whom you had contracted to make deliveries at low prices?

A. In effect, yes. All the coal that was sold by the Morrisdale Coal Company during that period of time was what was purchased and turned over, and sold in that way. They may have sold some other coal, although I doubt it, from other mines on other railroads during that time.

Mr. GOWEN: Mr. Glasgow, I asked you to have the books of the Morrisdale Coal Company here to cover the sales of coal, this morning.

Mr. GLASGOW: I must have misunderstood you.

By Mr. GLASGOW:

Q. Have you books here showing the sales of coal made by you during that period?

A. We have the books here, I suppose, showing the coal that was invoiced to the various people during this time.

Q. Have you any other books?

A. I do not know whether they are in the court room or not. We do have such a book that will show the invoices monthly to every consignee.

By Mr. GOWEN:

Q. And the prices realized?

A. At the prices we received for it.

74 Q. I wish you would just state what it was that caused the abnormally high prices for the Winter,—during the Fall

and Winter of 1902 and 1903, when coal commanded such a high price?

A. I could only answer that question from my personal view of the situation.

Q. You know yourself?

A. Yes; pretty well.

Q. It was the anthracite strike?

A. No, it was not, I beg to differ with a great many. The cause of the excessively high prices in the Fall of 1902 and the beginning of 1903 was the panicky condition on the part of the people thinking they were not going to get enough fuel to keep themselves warm, and also because a number of manufacturers in New England, who were making very great profits out of their business, feared that they would not get enough fuel to run their plants, and bid excessively high prices to get it, and ran the price of coal up to an abnormal degree.

Q. In other words, it was the fear, as you assume, of the consumers that sufficient coal would not be transported to the market to enable them to get what they required?

A. The fear on the part of the consumers and the railroads that they could not get all the coal they wanted, and they wanted to be well protected.

Q. Are not these the facts? The strike in the anthracite coal fields—the long strike, the last long strike, occurred in 1902, did it not?

A. Yes, 1902.

Q. It was following that strike that these very high prices prevailed?

A. Yes.

Q. There were a large number of railroad companies which had been formerly accustomed to using anthracite coal for their fuel supply—that is, for use in their locomotives?

A. Yes.

75 Q. And they were compelled, were they not, to draw from the bituminous fields?

A. I do not know to what extent that was. The anthracite railroads used a very much larger proportion of bituminous coal ordinarily for the running of their road than is commonly supposed, and when the anthracite strike occurred, of course their business was reduced. How much they had to substitute soft coal for anthracite I do not know.

Q. But there was that substitution?

A. After a time it was necessary.

Q. The railroads had been using anthracite?

A. Undoubtedly.

Q. And that resulted in a large number of foreign railroad cars coming into the bituminous regions, which had theretofore been used by those companies for the transportation of anthracite, which they had been burning?

A. That is possible. I do not know. It is possible.

Q. You know this, do you not, that the Clearfield coal, the coal

produced in the Clearfield region, having the lowest freight rate, is the coal which the railroad companies used for their fuel mainly?

Mr. GLASGOW: What roads do you mean?

Mr. GOWEN: Any railroads drawing their supply from the bituminous fields adjacent or tributary to the Pennsylvania Railroad lines.

The WITNESS: Do you mean their entire consumption?

By Mr. GOWEN:

Q. I mean railroads like the Lehigh Valley and the Philadelphia & Reading and the New England roads, like the Delaware & Hudson and the Boston & Maine——

A. And the Delaware, Lackawanna & Western?

Q. They do not draw their supply of bituminous coal from
76 the Pittsburg fields, or the other fields west of the mountains, but draw their supply from the Clearfield region?

A. And from that known as the Latrobe & Westmoreland districts.

By Mr. GLASGOW:

Q. And the Fairmount?

A. Yes, and I think they also draw from the Fairmount.

By Mr. GOWEN:

Q. I am speaking of bituminous fields tributary to the Pennsylvania Railroad?

A. Yes, sir.

Q. The Latrobe & Westmoreland coal sells at a higher price than Clearfield?

A. I do not know about Latrobe. I could not say. I think in some instances they sell as low.

Q. The Westmoreland commands a higher price?

A. What we know as the Westmoreland Coal Company would, yes.

Mr. GLASGOW: I do not see the pertinency of this.

Mr. GOWEN: I want the witness to state that the railroad fuel supply of the eastern railroads which is drawn from the territory tributary to the Pennsylvania Railroad comes almost entirely from the Clearfield district.

Mr. GLASGOW: What bearing could that have on this case?

The COURT: I think it is relevant.

By Mr. GOWEN:

Q. Is not that the fact?

A. It comes, largely so.

Q. Does not 80 per cent., at least, of it come from there?

A. I would not fix the percentage, for I do not know it.
77 That has changed very much in recent years. The Latrobe Coal Company, by reason of the reduction in freight from the

Westmoreland district, has increased its proportion of supply for railroad purposes.

Q. How late has that change been made?

A. I do not recall when the change was made. Several years ago.

Q. It was only a year or so ago?

A. I do not remember now. Several years.

Q. That lower freight rate was prevailing from the Latrobe region during the period of this action?

A. I do not know. I could not say.

Q. I hand you the sales book of your company, to show the prices realized for coal beginning in June, 1902, and I will be glad if you will state now whether that does not show that in the month of June and throughout the succeeding months in which the abnormally high prices for coal prevailed, the Morrisdale Coal Company sold at high prices a considerable part of its output?

A. This book shows the sales of the Morrisdale Coal Company each month, through its various offices of Philadelphia, New York and Boston—it shows all the sales, both those taken from the mines on the Pennsylvania Railroad and those taken from mines that are not tributary to the Pennsylvania Railroad at all; also the sales of coal which were purchased and re-sold, having no bearing on this situation at all, and we arrived at the average of sales—while it is not absolutely correct——

Q. I did not ask about the average.

A. I am going to give the average for each office, the average selling price of each office.

Q. I did not ask you that question. If Mr. Glasgow wants that he can bring it out. I want to know whether this book does not show that a considerable part of the coal sold by the Morris-
78 dale Coal Company during the period of abnormally high prices was sold at the ruling high prices?

A. In order to answer that question understandingly, I would ask you to fix what would be a high price.

By Mr. GLASGOW:

Q. State what the prices were that it was sold at?

A. I am prepared to do that.

By Mr. GOWEN:

Q. What was the maximum price then that you realized in June for a portion of your coal—June, 1902?

A. Coal sold for shipment f. o. b. cars at the mines, there appears to have been a sale of 340 tons, at $4.75. That seems to be the highest price.

Q. There were other sales made at the price of $2.60?

A. Yes.

Q. There appears to have been one for $3.25?

A. Yes. That is in June.

Q. Now in July?

A. And we paid in purchasing coal in that month an average of $1.93. I do not know what the highest price was.

Q. I have no objection if you want to state the average price realized that month?

A. The average price realized——

By Mr. GLASGOW:

Q. Give the items showing the highest price for coal in accordance with the question. In July you have not given it.

Mr. GOWEN: He is going to give the average of June—the average price realized.

The WITNESS: The average price on coal sold through shipment to lines through the Philadelphia office was $1.23, at the mines.

79 The average on coal sold to the Boston office was $1.18 at the mine, for a portion of it. Another portion was $2.43.

By Mr. GLASGOW:

Q. Does that include in the prices the deliveries upon contracts which had been made prior to that time, but which deliveries were made during the month?

A. It does. It includes the sales.

Q. It includes that, too?

A. Yes, all sales.

Q. Then, as a matter of fact, when you give the average, it does not show what the market value of coal during the month of June was except the market value of all you sold, taken into consideration with what you had contracted to sell prior thereto?

A. That is true, because here is some coal sold at $1.15 a ton.

Q. And others at $4.75 a ton?

A. Yes.

Q. When you say $1.15 a ton, would that mean coal that was delivered during that month under contracts prior made?

A. That is correct.

By Mr. GOWEN:

Q. I understand, in giving the average price realized by the Morrisdale Coal Company for all coal which they sold in June, 1902, you have embraced all coal whether sold and delivered under contracts or sold and delivered from day to day, as the market would take it?

A. That is right for the various offices. Coal sold through Philadelphia again, $1.85 at one point and $1.35 at another point.

Q. Those are averages?

A. Those are averages.

By Mr. GLASGOW:

Q. What month was that?

80 A. The month of June. $1.35 was coal that was sold almost exclusively, apparently, under contract. There was one portion to contracts and one portion to new business.

Q. July is the next.

A. In June, again, in New York, $1.24, and a portion of it at

$1.37, depending on the ports from which it was shipped. Do you want July?

By Mr. GOWEN:

Q. Yes.

A. $1.20 for Philadelphia business, of that line. Some of it was sold at $1.15, $1.00, $1.25, $1.10, $4.75, and so forth.

Boston office, $1.19. That appears to be their average.

By Mr. GLASGOW:

Q. What was the highest price there?

A. Through Boston that month, $4.15, $3.95, $4.35, $4.05, $4.00, $5.40, and at the harbor of Philadelphia, the shipments there were $1.21 and $1.28. It is not separated from the freight, so as to bring the highest price and the mine price in it.

New York, $1.31 and $1.44. Some coal was sold at—it is not separated from the freight, either.

August, Philadelphia, $1.15. Some of it sold for $1.10, $1.15, some of it at $2.85 and $2.70.

Boston, $1.10. A little of it was sold at high prices, like $4.00, $3.95, $4.05, $5.00, $4.40, and the balance at lower prices, under contract.

In the harbor of Philadelphia $1.83 and $1.72.

New York $1.30 and $1.38.

Q. What month was that?

A. August.

September, Philadelphia, $1.43, $5.95, $4.00, high prices. Then $1.10, $1.15 and so on.

Boston $1.28, some at $4.15, $5.00, $5.30. Then at $1.10 and so forth under contract.

At the harbor at Philadelphia, it has not been worked out for the month. I cannot say.

81 New York $1.37 and $1.28.

Q. What month was that?

A. The month of September.

The month of October has not been worked out at Philadelphia, but the Pennsylvania Railroad paid us $5.25 for some coal they confiscated that month, and then we sold others at $5.00 and $6.00 and $5.75, a little of it, and the balance went in at $1.10, $1.15 and so on. Over $2.00 would be the average.

Boston office $1.81. Some of it as high as $4.15, $3.85, $5.00 and the balance under the contract.

Philadelphia harbor $1.15 and some of it $1.07.

New York it appears to have been $2.04 a ton.

By Mr. GOWEN:

Q. The average?

A. The average, some of it being $8.50 for coal, and $8.25, some of it. $5.00, $2.00 and $2.75, a great deal of it.

By Mr. GLASGOW:

Q. What month was that?

A. The month of October. Another port in New York, $3.48, at various prices ranging from $8.00 a ton down. The bulk of it at $2.75, $2.75 and $3.00.

November, Philadelphia $1.43. Some of it at $5.90, $5.15, $1.20, $1.25, $1.15, and so forth.

Boston, $1.43. The highest price there was 125 tons, $7.00. The balance $1.10, and so forth.

Philadelphia harbor has not been worked out as an average.

New York, month of November, 1902, $1.18. Another port, $2.36.

December, $1.76 appears to be the Philadelphia average. The Pennsylvania Railroad apparently took a good deal, and paid us $6.35 for some and $7.35 for some. That is the month of December. That increased the average very greatly. The Pennsylvania Railroad took it, much to our annoyance at that time.

82 In the Philadelphia harbor $1.15.

New York, December, $1.28, one port, and $1.39 from another port in December. That was about the highest price, I think.

January, Philadelphia apparently was $2.37. The Pennsylvania Railroad again helped themselves, more than I had thought they would have done.

By Mr. GLASGOW:

Q. What was their price?

A. The price they paid us, when they took the coal, $6.05, $5.20, $4.10, and $6.25, which they objected to at the time, but finally consented.

In the harbor at Philadelphia $1.18.

New York, where the coal the Pennsylvania Railroad Company took was outstanding to meet obligations, $1.39 and $1.39. One port as high as $1.72. That runs through January. Shall we go any further?

By Mr. GOWEN:

Q. No; I think that is far enough.

A. Of course, those figures are not absolutely accurate.

Q. You have referred to various market prices paid to you by the Pennsylvania Railroad Company for coal that you say they took?

A. Yes.

Q. That means coal which was in transit on their lines, and which they took for their own use?

A. I always understood they took it for their own use. It was in transit on their lines.

Q. The price which they paid you was the price you claimed you could have secured for the coal at its destination?

A. The price that they paid us when they took the coal from us—

of course, it interfered with the delivery of coal on other business, and they wanted to pay very much less money. I represented to the Pennsylvania Railroad Company that we had to pay in
83 many instances more money than we asked of them, to replace the coal, to meet the obligations, so that they finally, after some little discussion, consented to pay.

Q. But your claim was, was it not, in all those cases, that if that coal had not been taken by the Pennsylvania Railroad Company, it would have been sold for the figures they paid?

A. No, I do not think I ever claimed it that way. It could have been sold for the figures which they paid, but we would have had to replace the coal for carrying out obligations at the figures they paid, or even in some instances more.

Q. Have you any correspondence with them on that subject?

A. Not that I recall, but there were several interviews—frequent discussions.

Q. You know during this period of high prices, that there was very considerable uneasiness—not to say alarm—among the consumers of coal?

A. There was.

Q. And they were actively bidding for it at the mines—at least, the middle-men were actively bidding for the coal at the mines?

A. The coal market was very active.

Q. And the prices paid were very high for coal?

A. They were.

Q. There was no difficulty, I suppose you will say, as to producing all the coal they required?

A. No, I should not think there was.

Q. The difficulty was purely a transportation problem, was it not?

A. I think so.

Q. The difficulty was to get the coal to market?

A. Yes.

Q. Which the consumers wanted immediately?

A. Yes.

Q. And that led to high prices?

84 A. Yes, that led to high prices, and of course that coal had to be secured to meet the obligations, and we ourselves were compelled to bring a great deal of coal from the port of New York in order to meet the obligations entered into, to cover that deficiency.

Redirect examination.

By Mr. GLASGOW:

Q. When you spoke of the Pennsylvania Railroad Company having confiscated coal, you meant coal that was on their line that was taken by them, and for their own purpose, whatever it may have been?

A. Coal that was destined to other points, shipped from the mines, and consigned to some point, which they took in transit.

Q. You mentioned a number of items where they paid you for coal. As I understood you to say to Mr. Gowen, they paid you

approximately at least the price which you would have had to pay for the coal to supply the party to whom it was to go?

A. The price which we did have to pay for it.

Q. Mr. Gowen has referred to what is called fuel cars, fuel coal for the purposes of the Pennsylvania Railroad Company. As I understand you, the Pennsylvania Railroad Company makes certain contracts with coal miners in the Clearfield region for the delivery of coal to it in cars at the mine?

A. I understand it so.

Q. Do you sell your coal, or any of it, for delivery in cars at the mine?

A. No; I think we have sold the Pennsylvania Railroad——

Q. I am not talking about the Pennsylvania Railroad. I am talking about any other coal. Is it sold at the mine f. o. b. the cars?

A. Yes, some of it is.

Q. That is a very usual thing for coal going to market?

A. Yes.

85 Q. To be sold f. o. b. the tipple, the mines?

A. That is the usual basis, except coal sold at tidewater, which carries with it freight and delivery.

Q. That is a delivery price?

A. Yes; for coal mined and shipped to the consumer or consignee from the mines to his point of consumption in the railroad car, it is ordinarily bought at a price f. o. b. the cars at the mine.

Q. And that is the same method as adopted as to the sale of fuel coal by the railroad company?

A. Precisely.

Q. Then the railroad company sends cars to the mine to transport that coal for the miner, to such points on the Pennsylvania Railroad as it may be desired to carry it?

A. It does.

Q. The cars which are used by the Pennsylvania Railroad for the purpose of removing that coal from the tipple of the shipper—could those same cars be used in interstate commerce, or in carrying your coal, or coal of other shippers to New Jersey or New York? Could the same cars be used by the mine owner?

A. They are used.

Q. The same cars?

A. The same cars. It may be that the Pennsylvania fuel supply today, would go through South Amboy or Hartford, Connecticut, tomorrow.

Q. Then if those cars are taken out of the total cars in the region, and arbitrarily given to some shipper, without charging them up against him, to what he is entitled to under his percentage, that takes out of the use in the interstate commerce so many cars. Is that correct?

A. It does, and it reduces the amount of cars that distribute in that way.

Q. The individual cars referred to by Mr. Gowen, they are cars owned by the mine owner or operator, which he allows the

86 railroad company to use upon the payment of certain wheelage or rental?

A. He receives a rental from the railroad company, what is called a wheelage, 6 mills a ton a mile run for those cars. They carry his coal from his mines, or wherever he places them—at whatever mine he places them.

Q. The railroad company pays the mine operator for the use of those cars?

A. He does. The railroad company pays a wheelage, of six mills upon a mile run for one car.

Q. Then those cars go into the field, and are distributed to the owners of them at their mine?

A. Either to the owners, or, if they elect to place them anywhere else, they place them.

Q. To such person as the owners might designate?

A. Yes.

Q. Then, under the system which the Pennsylvania Railroad Company had in effect during the period covered by this suit, they did not charge those cars against the number that the person who had them was entitled to under his percentage?

A. No. During this period of time they always informed me that those were all eliminated, and what was left of their own equipment was divided among the various mines, on the pro rata basis.

Q. Then the foreign railroad fuel cars, cars coming in every day, the Philadelphia & Reading or the Lehigh Valley—they are used by the Pennsylvania Railroad Company for transporting coal from mines to those railroads?

A. Yes.

Q. And they are placed at mines where the foreign railroad, as you call it, has purchased coal, and are shipping that coal, and they are not charged against the number which the party using them is entitled to under his percentage. That is true?

A. During this period of time they used the foreign rail-
87 road cars in precisely the same way that they used the individual cars or their own fuel supply cars, exclusively. They have changed that now.

Q. They have changed it now?

A. They have changed that situation.

Q. They are counted now?

A. In a manner. In a measure they are counted now.

Q. The individual cars are now counted in a way?

A. Yes.

Q. And the fuel cars?

A. Yes.

Q. The railroad company's own fuel cars are counted?

A. Yes.

Q. That has been since 1906, has it not?

A. I think 1906 was the time.

Q. The railroad company changed the rules so as to count, in a manner——

A. They did.

Q. —these cars against the party using them?

A. They did.

Q. After taking out these cars which they assigned arbitrarily to these mines using them, and did not count them, then what cars are left they divided on this percentage basis?

A. They did.

Q. During the period covered by this account, have you counted at your mines all the cars which were received by your mines of every kind and character?

A. We have.

Q. Individual, fuel or anything else?

A. We have counted all the cars.

Q. And any deficit in cars which your shipment shows is a deficit after counting all the cars of any character which were used at your mines?

A. That is correct.

Q. And these ten cars which Mr. Gowen speaks of, and as
88 you have already said how you got the ten cars a day, if they were furnished to you, they were counted in this statement, against what you were entitled to under your percentage?

A. Yes, undoubtedly. It was on the sheet, and we have taken everything off the sheet, as it appears on it.

Q. Did you have a conversation with Mr. Trump about the car service which you were getting up there in 1902 and 1903, and as to cars?

A. Frequently; and also with the vice-president of the railroad and the general manager.

Q. Did they say anything to you about the service you were getting.

A. Yes; we discussed it very frequently.

Q. And can you tell the jury what they told you as to the difficulty you were suffering under?

A. The vice-president, who was at the head of that department—I always so understood——

Q. Who was that?

A. Mr. Prevost—he admitted repeatedly, when I showed him these various statements, that our situation was a very unique one, and he did not know that it was paralleled anywhere on their system, that we had a very large plant, that it cost a great deal of money to put it into position and develop it, and we could not get transportation enough to keep it running, with any profit, or in fact, in any proper shape at all, and he said, "How can I help you out, because I will do anything I can, within reason?" I said, "Mr. Prevost, I don't see how, unless you give us more cars. It is up to you, as a railroad man, to devise a method by which you can transport this coal." I said, "As it is now going with the percentage you have, you will have to put 1,000 cars a day in that region, in the distribution, to give us sufficient cars, and you cannot do it. You never did do it, and you will never be able to do it,'" which he ad-
89 mitted, and the first way in which we came to get the ten cars per day I think was in 1901, when they first commenced running steel cars, and I went to Mr. Trump and Mr. Hutchinson, and asked them to run the steel cars over to us, and their

reply was, "That they cannot go on that railroad, on that branch, the bridges won't bear them, and the people cannot load them." I answered that there would be only one bridge between their new line and the Morrisdale mine, and I thought it would bear the steel cars as well as any bridge on the railroad. Finally, after a good deal of discussion, he agreed to look into the question, and see whether he could place them there. They then made a reply later on that they could, but no other operator in that region could take the steel cars, that the tipples were not high enough, the tracks would not bear them, and all sorts of good railroad reasons, I suppose. Then they commenced to run steel cars to us, ten a day, I think it was, and then they told me later on that it attracted some attention, that other operators were complaining about our getting these cars, and they stopped it, and we referred to my statement, not once but frequently, to the Pennsylvania Railroad Company, that we could not do business by favor in that way, because we never knew where we stood, and our obligations at tidewater, especially with the steamship companies, must be carried out, that we entered into with them, and we must have a reasonable degree of assurance as to what we could do, and when the year 1903 was coming on, after all this difficulty in 1901 and 1902—or 1902, it was, I went to them again, and I said, "Mr. Trump, we are about entering into a year's business. I have had so much trouble in the past two years, we have lost business and lost position with the consumer, because I could not carry out the obligations I had made. I want to know whether you can assure us of a reasonable car supply for this year." Their reply was that they could, and they started in, and January and February and March we got a very good car supply, but not ahead of what our percentage would
90 entitle us to. None of us foresaw the anthracite strike, which was coming. When it came, the market was exceedingly active, and their car supply seemed to diminish very materially, and we had obligations, and we were up against a stone wall. We did not know what to do, with this mine costing us at least $1500 to $2000 a month, in idleness. Then I said to them, in the Fall of the year, I think it was September, "I will offer to build 150 cars, for immediate delivery." I said, "Mr. Prevost, will you allow us to build them? Maybe it will help us out." He said, "We are opposed to anybody putting cars on this line unless they will build 500 as the minimum, and they must build steel cars."

Q. Did anybody there have 500 at that time?

A. Yes; two or three. The Berwind-White Coal Company had 500; the Pennsylvania Coal & Coke Company had 500, the Westmoreland Coal Company, the Keystone Coal Company and, I think Jamieson, and maybe some others. I do not know. I said, "We cannot get steel cars under ten or eleven months' delivery. The Allison Manufacturing Company tell me we can get these in about sixty days to three months. 150 is all they will build, all they can give us." We discussed the question between Mr. Trump, Mr. Prevost and myself. Finally they assented to us building those cars, and I said to them at the time, "We do not want to build them, it

is not for us to build the cars, it calls for an expenditure of $135,000, and I cannot figure any way that I will get this back out of the wheel service at all. I do not see how it is possible, but this mine is costing us so much in idleness, our business is being hampered, and we are willing to use that method to help us out. That is the way we came to get the individual cars.

Q. Then you got 150 cars, did you not?

A. Yes.

91 Q. And that is counted in the statement as against what you were entitled to under your percentage?

A. Yes. I have always contended with them that the percentage should be a percentage of all the cars that came into the region, irrespective of what kind they were. We had a conference once with Mr. Thayer and Mr. Trump—I do not know as Mr. Hutchinson was present then, in which I defended the same position, and I have always taken the ground that every car, whether of a foreign railroad, fuel, supply, or individual, should be counted, in making up the percentage basis upon the capacity of the whole region.

Q. I want to call your attention to this statement which you had prepared which you have before you there. During the month of March, 1902, you appeared to have loaded and shipped 204 cars more than the percentage which you were entitled to?

A. Yes, that is right.

Q. During that same period the Berwind-White Company *have* their entire percentage?

A. This sheet shows they had 54 cars more than their proportion.

Q. That sheet is taken from the Pennsylvania Railroad sheet?

A. Yes.

Q. During the month of April you had 295 cars in excess?

A. We did.

Q. And the Berwind-White Company were short ten cars?

A. Ten cars.

Q. And during the month of May you had 187 in excess?

A. Yes.

Q. And the Berwind-White Company had nine short?

A. Nine short.

92 Q. After the month of June, as I understood you yesterday, you said the price of coal during that period was comparatively low?

A. Yes, because the market had not commenced to feel the anthracite strike then.

Q. You said in June the market began to increase?

A. Commenced to go up.

Q. From June, 1902, down to and including January, 1903, did you ever at any time manage to get the number you were entitled to under your percentage?

A. No. We were behind every month.

Q. And during that same period, from July, 1902, to January, 1903, inclusive, the Berwind-White Coal Company got in excess of the amount they were entitled to under their percentage, except the month of August, 1902?

A. That is right. They were cars short in the month of August, 1902.

Q. Then it appears that, in the month of February, 1903, you had 39 cars more than your percentage called for?

A. We did.

Q. And you make no claim during that month?

A. None.

Q. During the same month, how many cars did the Berwind-White Company have in excess of their percentage?

A. 591.

Q. In the month of June, 1903, you had 18 in excess of your percentage?

A. We did.

Q. How many did the Berwind-White Company have in excess of theirs?

A. 307.

Q. In the month of January, 1904, you seem to have had 65 in excess of your percentage?

A. That is right; 65.

Mr. JOHNSON: We object to this because it is not re-examination on the cross-examination.

93 The COURT: I really cannot see the advantage of going over it again.

Mr. GLASGOW: I am not going over it again, except in so far as Mr. Gowen tries to question the statement of Mr. Wigton, on cross-examination, that other people did not get all the cars they wanted.

The COURT: The point is, we have the figures already, and you can draw any inferences or argument you please from them, without going over them again.

By Mr. GLASGOW:

Q. About the coal, or some part of the coal, which was shipped out by way of the New York Central. Were you able, in addition to such coal as was shipped by the New York Central, to have filled your percentage of cars, if they had been furnished to you by the Pennsylvania Railroad?

A. I do not think I quite understand the question.

Q. Would the fact that you had taken some of your coal out by underground passage and shipped it by the New York Central, have prevented you from filling and shipping all the cars that you were entitled to under your percentage, if the Pennsylvania Railroad Company had furnished them?

A. No; we could not only fill all we were entitled to, but all we were rated, because our actual working capacity was in excess even of their rating for us, as was evidenced when we had the cars and loaded them.

Q. So that your percentage of the cars, or the cars that you were entitled to under your percentage, from the Pennsylvania Railroad, you needed in addition to any service you might have had from the New York Central?

A. Yes.

94 Q. Then, as I understand you, the coal that you used for filling contracts from other mines, in order to take the place of that coal you bought other coal in the market? For instance, you had other mines in other districts and you used that coal by reason of the deficiency that occurred by reason of the Pennsylvania Railroad not furnishing you cars, you used that coal on the contracts and then you bought other coal in addition to that?

A. We bought other coal to fill in.

Q. You were engaged in business, that is, the Morrisdale Coal Company, both as coal merchants and as miners and operators of coal property?

A. Yes; both as operators producing coal and as merchants selling that, and also as merchants buying other coal.

Q. And you bought and sold in the period, as shown here, coal over and above the amount that you were entitled to under your percentage from the Pennsylvania Railroad?

A. We did.

Q. In making your contracts for the period covered by this claim, were you in any way guided as to the amount of coal you were to contract to sell, by the percentage which was awarded to you by the Pennsylvania Railroad, and the assurances of delivery under it?

A. Yes; we have to be guided——

Mr. JOHNSON: I object to "and assurances of delivery under it". We have now a question which has assumed a fact, and if there were assurances, he had better ask whether there were and what they were. I object to the question, therefore, as containing in it an assertion of fact which has not been established.

Mr. GLASGOW: Mr. Johnson fails to recollect that this witness a few moments ago said that in the Fall of 1902 he went to the Pennsylvania Railroad officers and told them he was then ready to
95 make his arrangements for the coming year, and that they gave him assurances that he would have shipped over the line the amount of coal that his percentage called for.

The COURT: There is such testimony. If you confine your question to contracts made after that time, you may ask him that.

By Mr. GLASGOW:

Q. After that conference in 1902—I cannot recall the date?

A. I think it was in the beginning of 1903, or thereabouts.

Q. Were you then governed by what your percentage called for in making your arrangements for delivery of coal under contract?

A. I felt very much relieved, after the stress of the preceding year, and started in to do business with the expectation that we would have a better proportion, or supply, of cars than we had been receiving.

Q. Did you rely upon that statement in making your contracts?

A. We certainly did.

Q. Had you previously relied, or is it usual for you to rely on that percentage as to the coal which you should contract for?

A. Not exactly. As a coal operator I would not want to contract for more tonnage for the year than my estimated capacity as fixed by the Railroad Company, and then I would want to limit that to

what my general knowledge would show me was the average fair car supply for that district.

Recross-examination.

By Mr. GOWEN:

Q. Have you seen that statement which we submitted to your counsel, showing the total cars delivered to the Berwind Com-
96 pany, divided into the cars delivered by the Pennsylvania Railroad for its own fuel supply, the individual cars of the Berwind-White Company and Pennsylvania system cars?

A. I have seen that statement. (Referring to statement in possession of Mr. Glasgow.) If this is the copy or fac simile, I have.

Q. That statement was submitted for your inspection in order that you might determine whether or not the figures contained therein were correct or incorrect, was it not?

A. That is my understanding of it.

Q. In stating as you have done in answer to Mr. Glasgow's question, that, from month to month, there was an excess of cars shown to have been delivered at the Berwind-White Company's mines, you have ignored entirely the fact, which you know to be a fact, that they had a large number of individual cars, which they were entitled to the exclusive use of, and that they were also furnishing fuel coal to the Pennsylvania Company?

Mr. GLASGOW: I object to that, because he assumes that Mr. Wigton knows the proper solution of the question of law in this case. I deny absolutely, as his counsel, and he will if he knows what the law is, that the Berwind-White Company were entitled to the absolute use of these cars.

The COURT: Srtike out that phrase and let him answer the question.

Mr. GLASGOW: I have no objection to the question in that form.

(Question read as follows: "In stating, as you have done in answer to Mr. Glasgow's question, that, from month to month there was an excess of cars shown to have been delivered at the Berwind-White Company's mines, you have ignored entirely the fact, which you know to be a fact, that they had a large number of individual
97 cars, and that they were also furnishing fuel coal to the Pennsylvania Company?")

A. I have not ignored the fact at all. I had no idea that the Berwind-White Company were furnishing any fuel coal to the Pennsylvania Railroad, until I saw reported on the daily sheets from which this summary is made, that some of those cars were Pennsylvania Railroad fuel coal, and these sheets are the summary of all the cars they received.

Q. Then you saw on those sheets, from which that statement was prepared, that of the cars placed at the Berwind-White Company's mines, some were placed for fuel coal of the Pennsylvania Railroad, some were individual cars of the Berwind-White Company, and the balance were Pennsylvania Railroad system cars?

A. Under each heading—the Pennsylvania, on their sheets had

various headings describing the cars, and the numbers were placed under them.

Q. You have never verified the summary which was sent to your counsel showing the aggregate number of fuel cars, the aggregate number of individual cars and the aggregate number of Pennsylvania Railroad system cars which were delivered in the months to which you have confined your action, to the Berwind-White Coal Company?

A. I have verified the aggregate number of cars on that sheet, but I have not verified, nor has there been separated on this summary, the amount of fuel cars or amount of individual or foreign cars.

Q. Then I understand it to amount to this: that if the Berwind-White Coal Company are entitled to the exclusive use of their individual cars, and if the Pennsylvania Railroad Company is justified in placing at the mines of the Berwind-White Coal Company cars for its own fuel without regard to the question whether or not that may give the Berwind-White Company more cars than you
98 got—that, if those two conditions are true, then you are unable to state whether or not the Berwind-White Company got any cars which they were not entitled to?

Mr. GLASGOW: I think I can relieve Mr. Gowen in accordance with what we understand between each other. We will admit in this case—and I will for Mr. Wigton—that if the cars of individual coal operators are not to be counted in the distribution, but are to be assigned arbitrarily to that operation or to the persons designated by it; if fuel cars for the Pennsylvania Railroad are to be assigned to the party using them, shipping coal for the use of that company, and not count those cars against the percentage to which the man using them is entitled; if the cars of foreign railroads sent into the mines and used by them are to be treated as arbitrary allotment and not counted against the number of cars that the man using them is entitled to under his percentage; then we have no claim here which we can assert, for we think that, after taking out all of these arbitrary allotments of cars, that the Pennsylvania Railroad Company has given to us the percentage of this small residue which is left.

Mr. JOHNSON: I want him to admit that he is not prepared to prove, and has not offered any evidence to show, that the Berwind-White Coal Company received more than their proportion of the Pennsylvania Railroad cars belonging to it. That is all we want to fix.

Mr. GLASGOW: I want to further this as far as I can. I understand that Mr. Johnson wishes me to admit that, if the Berwind-White Company are entitled to the use of their individual cars without counting them against what they are entitled to under the
99 percentage, then the Berwind-White Company did not get any excess of what their percentage was?

Mr. JOHNSON: Of the Pennsylvania Railroad's own cars.

Mr. GLASGOW: I cannot go quite that far, because I do not know what is the number of the fuel cars.

Mr. JOHNSON: All I want you to admit is that you have offered no proof and are not prepared by evidence to show that the Berwind-

White Coal Company received of Pennsylvania Railroad cars during that time more than their proportion.

Mr. GLASGOW: I will admit this: that we are not prepared to show that the Berwind-White Company received more of the Pennsylvania Railroad Company's own cars than it was entitled to under this percentage, if these other cars which I have mentioned were to be deducted before the distribution was made.

By Mr. GOWEN:

Q. Coming to the purchase by you of the 150 individual cars, that purchase was made in the early part of 1903, you have testified?

A. I think the deliveries were made then; the purchase, I think, was made in the Fall of 1902.

Q. There was no difference made between you and any other operator in the method of counting those individual cars, was there, after they came on the road? You were not treated differently as to your individual cars from any other operator, were you?

A. Not that I know of. I do not know.

Q. As far as you know, they were not charged against your proportion, nor were they charged against the proportion of any other operator?

A. I don't know.

Q. You do not think they were, do you?

100 A. I think they were treated just like anybody else running individual cars.

Q. You were asked as to the amount paid by the Railroad Company for the use of these individual cars, and you said that it was six mills. That is the rate that is paid by the Pennsylvania Railroad Company and all other railroad companies for the use of other cars, whether they are railroad or individual, is it not, the same rate?

A. I think so.

Mr. GLASGOW: May I just remark to your Honor one further word, in connection with the admission; if the Berwind-White Company's cars, which I have mentioned, should not be counted, your Honor will understand that our claim falls, if that is determined, because we have gotten what cars we were entitled to on that basis.

By Mr. GOWEN:

Q. Referring to the conditions that existed during the latter part of 1902, was not the state of affairs existing in the coal trade at that time an unusual state of affairs and resulting from a very unusual situation?

A. The conditions which existed at that time, during that anthracite strike difficulty, the pressure was very heavy and brought about an unusual condition in the market, and, as the officials of the Pennsylvania Road had said to me when I wrote for cars in the Fall of the year, "Well, there is certain steamship business that must be taken care of and it must be kept running." I contended that ours ought to be kept running, too, and we did not get quite enough cars to do that, and the condition was a very abnormal one, or we would not

have been forced to bring coal from Great Britain, as some others were also.

Q. And that condition resulted from a general inability to get the coal to market as rapidly as the consumers wanted it?

101 A. Yes, I think that was the basis of it.

Q. I have had occasion to refer to the testimony which you gave before the Interstate Commerce Commission. I want to read you another extract from your testimony and ask you whether you are prepared to state that that is a correct statement of the conditions existing at the time, or whether you want to correct your statement. (Page 35.) I put this question to you: "Q. The difficulties which arose in the prompt delivery of coal during that winter (which is the winter of 1902-1903) were largely conditions which resulted, not from a shortage of cars, were they, but from inability to move the traffic rapidly?" You answered: "That was the weather condition, that is true, right in the middle of the winter; but the car supply, so far as we are concerned, speaking for myself, was practically all through the year. Q. Now that shortage resulted from carrying out the method of distribution, did it not? A. I do not know what the method of distribution was. Q. Whatever it was, you do not think you were individually discriminated against at that time? A. No, sir; I do not think that. Q. It was a question of the failure of methods in force to accomplish the best results? A. All their facilities were taken up for cars that were not counted in the distribution. Q. That is, individual cars and fuel cars? A. Yes, sir. When these facilities were taken up, there was not enough left to furnish anybody with cars." Do you recall that?

A. I recall that, and I can state that that is in effect correct, because the discussions with Mr. Prevost led to this diclosure, that of approximately some 300 cars per day that went into that district, approximately 240 were not counted in the distribution at all, which left in the neighborhood of some 60 cars which were distributed, of the Pennsylvania's equipment, and our percentage on that number was given us fairly, and I think was given to any others, and

102 they put to me the question, "Why don't you go and sell coal to the Boston & Maine and the Lehigh Valley and some other railroads and get these fuel cars to help run your mines?" My answer to that was, in effect, that there were good reasons why I preferred to market coals in other directions and I did not want to be confined or dictated to as to where I should sell coal, especially when these people were selling coal at a very low cost by the car. I do not think we were discriminated against in the effect that we did not receive our percentage out of the manner of distributing cars.

Q. Then you do not think you were discriminated against in that you did not receive the number of cars which were treated by the Railroad Company as allotable or distributable cars?

A. I do not think we were. I have no ground to say we were.

Redirect examination.

By Mr. GLASGOW:

Q. As I understand the situation, if the complaint you make that if they did not count these cars, individual, fuel, and foreign fuel cars which have been spoken of—if it should be held that it was proper for them not to count them, then your conclusion is that you were not discriminated against in the distribution of the residue and you got your percentage of what cars were left. That is your position?

A. As I said to them then, "Simply put 60 cars a day more in the region and nobody will get any cars except the few that own these cars; you will cease to be a common carrier and we are off the map entirely." I said, "I do not think for a moment you are discriminating against us in distributing the cars that remain after you have eliminated everything you do not count."

103 Q. But your claim of discrimination is that, before they distributed on the percentage basis, they took out a large proportion of the cars which could be used for the pro rata hauling of coal and gave them arbitrarily to other people?

A. Yes.

Q. Something was said about individual cars being used, assigned as somebody else's. Is it a matter of fact that you have always taken the position with the Pennsylvania Railroad that all cars should be counted?

A. Always.

Q. At all times?

A. Always; at every discussion.

Q. Both before and after you got the individual cars?

A. Yes, sir.

Q. And while they were there?

A. And while they were there.

Q. In this statement of yours, your individual cars are counted, are they?

A. Yes, sir.

Recross-examination.

By Mr. JOHNSON:

Q. The question was one of car shortage, was it not? There was an insufficient number of cars to transport all the coal that could have been mined; that was the question, was it not?

A. There were not enough cars to transport all the coal that could have been mined.

Q. And what you claim is, that you should have been entitled to use a part of the cars that the other operators had bought and paid for themselves? That is what you rest your claim on, is it?

A. Not exactly.

Q. If you can show us in what ways it differs, I would be glad to have you do so.

A. The railroad enters the region and arbitrarily makes
104 a rating upon which to base capacity, and our proportion of that capacity is the percentage we bear to the aggregate of all. If they are going to furnish cars practically up to their ability to transport and then eliminate all that they want to and leave very few, you get a rating or capacity of your mine which is, in that view of it, decreased proportionately.

Q. All I want to know is whether you claim that you were short because you did not get a certain portion of cars that belonged to other operators?

A. I claim we were short because we did not get the percentage of 4.8 of all the facilities to transport coal that went into that region.

Q. Including cars belonging to other operators?

A. Including all kinds of cars.

By Mr. GLASGOW:

Q. As I understand you, your claim is not based, as Mr. Johnson suggests, on the idea that you ought to have had assigned to you the cars of the Berwind-White Company which were owned by them, but that, when tonnage was hauled by the Berwind-White Company in those cars, the use of which was paid for by the Pennsylvania Railroad Company, that that tonnage hauled in those cars should have counted against Berwind-White Company on the percentage to which they were entitled?

Objected to by Mr. Johnson.

The COURT: I think both theories are now sufficiently well disclosed.

(At 12.35 p. m. a recess was taken until 2 p. m.)

FRANK W. MUENCH, having been duly sworn, was examined as follows:

By Mr. GLASGOW:

Q. Where do you live?

A. Philadelphia.

105 Q. What is your business?

A. Bookkeeper.

Q. For what concern?

A. The Morrisdale Coal Company.

Q. Did you make an examination of the car distribution sheets of the Pennsylvania Railroad Company for the months covered by the statement which I introduced yesterday headed, "Summary of cars placed in the Clearfield region by months taken from the Pennsylvania Railroad daily distribution sheets?

A. I did.

Q. Did you make up this statement from the distribution sheets?

A. Yes, sir; from the distribution sheet of the Tyrone Division of the Pennsylvania Railroad.

Q. Tyrone Division, and for distribution in the Clearfield region?

A. Yes, sir.

Q. Did Mr. Wigton go over that statement with you?
A. Under his direction this statement was made up.
Q. Is that the correct transcript or correct summary of what appears under those months on the distribution sheets of the Pennsylvania Railroad Company?
A. It is all the cars that were placed in that region.
Q. And the distribution thereof as to the Berwind & White Coal Mining Company and the Morrisdale Coal Company?
A. Yes, sir.

Cross-examination.

By Mr. GOWEN:

Q. The distribution sheets of the Pennsylvania Railroad Company which you examined show the character of cars placed daily at each mine in the region, did it not?
106 A. Yes.
Q. When I speak of the character of the cars, I refer to the fuel cars, the individual cars, the system cars, so called—that is, the Pennsylvania Railroad cars—and the foreign cars?
A. I merely took off——
Q. The sheets do show those cars separately?
A. Yes, the Pennsylvania Railroad sheets do, yes.
Q. And in order to arrive at the total number of cars placed at any one mine and in any given period, you have to take off the totals of each column, have you not, showing the foreign, the system, the individual and the fuel cars?
A. Yes. I took off what were the steel cars and what were the other cars in that region—for that certain period; one steel car equivalent to two wooden cars.

Redirect examination.

By Mr. GLASGOW:

Q. There is a column on there showing the total number of cars in the field on any particular date, whether they are steel cars or whether they are wooden cars?
A. Yes; the total cars in the region—wooden cars.
Q. There appears a column showing the total cars in the region on that day?
A. Yes.
Q. The total as shown on that sheet is what you took?
A. Yes, sir.
Q. You did not undertake to take the items from which that was made, whether they were fuel, individual or other cars?
A. I did not.
Q. You took the total shown on the sheet?
A. That is right.

Plaintiff closes.

107 *Defendant's Evidence.*

WALTER V. BUCK, having been duly sworn, was examined as follows:

By Mr. GOWEN:

Q. Where do you reside?
A. Philadelphia.
Q. What is your business?
A. Manager of the Audit Company of New York.
Q. You are the Philadelphia manager of the Audit Company of New York?
A. Yes, sir.
Q. Have certain statements been prepared under your supervision made up from the car distribution sheets of the Pennsylvania Railroad Company?
A. Yes, sir.
Q. Is the statement which I show you, which is headed, "The Audit Company of New York, the Pennsylvania Railroad Company, Exhibit A, based upon mine capacity," and containing columns in it, "Morrisdale Coal Company," and "Tyrone Region," one of the papers that was prepared under your direction?
A. It is.

Cross-examination.

By Mr. GLASGOW:

Q. Did you examine the sheets of the Pennsylvania Railroad Company yourself?
A. In a general way, yes; all under my direction.
Q. I am talking about what you did. Did you examine those sheets in detail yourself?
A. I do not know what you mean by detail. I went over them all.

DENNIS C. LYONS, having been duly sworn, was examined as follows:

By Mr. GOWEN:

Q. Where do you reside?
108 A. Philadelphia.
Q. Are you employed by the Audit Company of New York?
A. Yes, sir.
Q. I show you the statement which I have just referred to, and ask you whether the figures embraced in that statement were made up by you from the figures shown on the car distribution sheets of the Pennsylvania Railroad Company which were submitted to you?
A. They were.
Q. And are these figures correct compilations of the figures shown in those sheets?
A. They are, to the best of my knowledge.

Cross-examination.

By Mr. GLASGOW:

Q. Where did you make this examination?

A. In our own offices. We had the distribution sheets in the office, and compiled the statement from them. They are an exact copy of the distribution sheets—of the information shown in the distribution sheets.

Q. Are you the gentleman to whom Mr. Mentz applied to go over and *and* compare your statement on those sheets with his?

A. I do not know that.

Q. Did you see the statement that was prepared by Mr. Mentz, of the Morrisdale Coal Company, of the number of cars in that field for distribution during this period?

A. Made by the Morrisdale Coal Company? No; I have not seen that.

Q. There is a difference between the two statements, and I want to see wherein the difference occurs. Take the month of June, 1902, and the distribution sheet for that month. Now I have gone
109 over with you the daily number of cars in the region during the month of June, 1902, as shown by the distribution sheets now in court?

A. Yes, sir.

Q. And by the distribution sheets, counting one steel car as equal to two wooden cars, it appears that there were in the field during the month of June, 1902 7,793 cars, does it not?

A. We show 7,590.

Q. The sheets show that?

A. Yes.

Q. You have it down as 7,590 on your statement?

A. Yes, sir.

Q. Can you explain why there is a difference?

A. I cannot explain right away. If we had the papers from which we prepared this report, I could very easily explain it. This report of ours is absolutely correct. We have verified it.

Q. So are the sheets correct—the distribution sheets.

A. We cannot account for that 203 cars without the original papers. We could not explain that right away.

Q. But the distribution sheets show 7,793, do they not?

A. Yes, they show that.

Mr. GLASGOW: I will have to go over it by months, unless counsel will agree——

Mr. JOHNSON: We have had our expert to make up the set of figures, and we stand by them.

By Mr. GLASGOW:

Q. Take the sheet for July, 1902, the distribution sheet for that month. There appear to have been in the region on the 1st day of July, 1902, 58 steel cars and 263 wooden cars, isn't that so?

A. 58 and 263, that is right.

110 Q. The 2nd day of July, 44 steel, 267 wooden, isn't it
A. Yes.
Q. On the 3rd of July, 40 steel, 158 wooden?
A. Right.
Q. On the 4th, 13 steel, 274 wooden?
A. Right.
Q. The next day, 78 steel, 241 wooden?
A. Right.
Q. The next day, 22 steel, 256 wooden?
A. Right.
Q. The next day, 54 steel, 227 wooden?
A. That is right.
Q. July 10, 11 steel, 182 wooden?
A. Right.
Q. July 11, 13 steel, 225 wooden?
A. Right.
Q. On the 12th, 4 steel, 154 wooden?
A. Right.
Q. July 14, 74 steel, 380 wooden?
A. Yes, sir.
Q. On the 15th, 64 steel, 147 wooden?
A. Yes, sir.
Q. On the 16th, 3 steel, 199 wooden?
A. Right.
Q. On the 17th, 5 steel, 151 wooden?
A. Right.
Q. On the 18th, 7 steel, 176 wooden?
A. Right.
Q. On the 19th, steel cars, 1, 175 wooden?
A. Right.
Q. On the 21st of July, 118 steel, 301 wooden?
A. Right.
Q. On the 22nd of July, 54 steel, 184 wooden?
A. Right.
Q. On the 23rd of July, 4 steel, 235 wooden?
A. Right.
Q. On the 24th, 31 steel, 180 wooden?
111 A. Right.
Q. On the 25th, 32 steel, 241 wooden?
A. Right.
Q. On the 26th, 1 steel, 214 wooden?
A. Right.
Q. On the 28th, 72 steel, 261 wooden?
A. Right.
Q. On the 29th, 67 steel, 210 wooden?
A. Right.
Q. On the 30th, no steel, 201 wooden?
A. Right.
Q. On the 31st, 64 steel, 214 wooden?
A. Right.

Q. Add that up, please, and let me know, counting one steel car to two wooden cars, how many there were in the field?
A. 7,584.
Q. How many do you make it on your statement?
A. 7,590.
Q. What is it for June?
A. 7,387; a difference of 197.
Q. How do you explain your sheet?
A. There is no use in trying to explain it, without a little time to look over our figures.
Q. I am asking you to explain the difference between your figures and the distribution sheets.
A. I cannot explain it by my papers. I cannot explain it until we get our original draft papers?
Q. Where are they?
A. In our office.
Q. Where is that?
A. In the Arcade Building.
Q. Take the next month.
A. We can explain all those differences.
Q. Take the next month.

The COURT: You had better withdraw the witness until we have those papers.

112 By Mr. GOWEN:

Q. Was that paper prepared by you?
A. Yes, sir.
Q. From the distribution sheets of the railroad company?
A. Yes, sir.

By Mr. GLASGOW:

Q. Is that statement based upon this (indicating)?
A. This is an exact copy of the records of the distribution sheets.
Q. Is that based upon this statement "A"?
A. This is an exact copy of the distribution sheets.
Q. You said that "A" was. Is that statement based on the figures as shown in your statement "A."
A. Let me see that.

(Statement marked Exhibit A shown witness.)

A. Yes.
Q. This is a statement which shows, as I understand it, the total number of cars placed in the mines in the Tyrone region during the years 1902, 1903, 1904 and 1905, and the distribution of those cars as between the individual cars, the company coal cars, the system cars and the foreign cars and the box cars?
A. Yes, sir.
Q. Taking the year 1902, what was the total number of cars placed at the mines in the Tyrone region?
A. 83,943.

Q. Of those 83,943 how many were individual cars?
A. 14,221.
Q. How many cars were Pennsylvania Railroad fuel cars?
A. 16,119.
Q. How many were what is called system cars, by which is meant, I understand, Pennsylvania Railroad cars intended for commercial shipment?
A. 31,048.
113 Q. How many were foreign railroad cars?
A. 22,544.
Q. How many box?
A. 11.
Q. For the year 1903 what was the total number of cars placed?
A. 81,279.
Q. Of those how many were individual?
A. 20,483.
Q. And how many were Pennsylvania Railroad fuel?
A. 15,614.
Q. How many were Pennsylvania Railroad system cars?
A. 20,947.
Q. How many were foreign railroad cars?
A. 24,222.
Q. And how many box cars?
A. 13.
Q. For the year 1904 what was the total number placed?
A. 64,650.
Q. Of those how many were individual?
A. 16,705.
Q. Company's fuel cars?
A. 11,477.
Q. Pennsylvania Railroad system?
A. 21,888.
Q. How many foreign?
A. 14,508.
Q. Box cars?
A. 12.
Q. For the year 1905 how many were placed?
A. 80,213.
Q. Of those how many were individual?
A. 26,716.
Q. How many company fuel?
A. 22,812.
114 Q. How many Pennsylvania Railroad system?
A. 24,769.
Q. How many were foreign?
A. 5,542.

Mr. GLASGOW: I reserve my cross-examination at this point until this other statement is taken up.

Mr. GOWEN: We offer in evidence this statement, marked Exhibit A.

The said statement is admitted in evidence, subject to the objection and cross-examination by counsel for plaintiff, marked Defendant's Exhibit A, and is as follows:

The Pennsylvania Railroad Company.

EXHIBIT A.

Based Upon Mine Capacity.

1902.	Morrisdale Coal Company. Rating in cars.	Total cars placed.	Percentage.	Tyrone region (with Snow Shoe region eliminated.) Rating in cars.	Total cars placed.	Percentage.
January	783	513	66.5	17,069	6,685	39.1
February	696	599	86.1	16,370	5,458	33.3
March	754	461	61.1	18,268	5,933	32.4
April	754	590	78.2	18,455	6,814	36.9
May	793	533	67.2	19,225	7,956	41.3
June	850	251	29.5	17,433	7,590	43.5
July	884	294	33.3	18,153	7,387	40.6
August	884	333	37.7	18,304	7,776	42.4
September	941	218	23.2	18,475	6,642	35.9
October	999	269	26.9	19,409	7,666	39.4
November	925	233	25.2	18,043	6,814	37.7
December	962	219	22.8	18,872	7,222	38.2
Total	10,225	4,513	44.1	218,076	83,943	38.4

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1903.	Morrisdale Coal Company. Rating in cars.	Total cars placed.	Percentage.	Tyrone region (with Snow Shoe region eliminated.) Rating in cars.	Total cars placed.	Percentage.
January	999	338	33.8	19,905	6,747	33.8
February	888	367	41.3	17,758	6,363	35.8
March	962	373	38.8	19,266	7,824	40.6
April	912	198	21.7	18,716	6,171	32.9
May	832	343	41.2	17,836	7,574	42.4
June	832	329	39.5	17,836	6,546	36.7
July	832	438	52.6	18,027	6,891	38.2
August	832	381	45.8	18,209	6,332	34.7
September	800	349	43.6	17,525	6,355	36.2
October	864	325	37.6	18,927	6,917	36.5
November	724	291	40.2	16,824	6,335	37.6
December	728	329	45.2	18,232	7,224	39.6
Total	10,205	4,061	39.8	219,061	81,279	37.1

1904.						
January	728	282	38.7	18,226	5,477	30.
February	700	328	46.9	17,557	4,900	27.9
March	756	296	39.1	19,103	6,375	33.3
April	728	303	41.6	18,434	5,718	31.
May	700	359	51.3	17,725	5,730	32.3
June	728	383	52.6	18,460	4,563	24.7
July	1,000	195	19.5	18,125	4,123	22.7
August	1,080	147	13.6	19,689	4,850	24.6
September	1,000	88	8.8	18,179	4,817	26.4
October	1,040	160	15.4	19,545	5,553	28.4
November	1,000	516	51.6	19,564	6,039	30.8
December	1,040	282	27.1	20,548	6,505	31.6
Total	10,500	3,339	31.8	225,155	64,650	28.7

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	Morrisdale Coal Company.			Tyrone region (with Snow Shoe region eliminated.)		
1905.	Rating in cars.	Total cars placed.	Percentage.	Rating in cars.	Total cars placed.	Percentage.
January	1,040	259	24.9	20,740	5,617	27.
February	960	396	41.3	19,194	5,831	30.3
March	1,124	527	46.9	22,314	7,158	32.
April	1,100	461	41.9	20,750	6,166	29.7
May	1,144	450	39.3	21,580	6,180	28.6
June	1,144	338	29.5	21,580	5,908	27.3
July	1,200	360	30.0	21,550	6,045	28.
August	1,296	330	25.5	23,286	5,952	25.5
September	1,200	359	29.9	21,620	7,263	33.5
October	1,248	396	31.7	22,568	8,486	37.6
November	1,094	454½	41.5	17,204	7,939	46.1
December	925	416½	45.0	12,051	7,671	63.6
Total	13,475	4,747	35.2	244,437	80,214	32.8
Total for 4 yrs	44,405	16,660	37.5	906,729	310,086	34.1

By Mr. GOWEN:

Q. I show you another statement and ask you whether that was prepared by you?
A. Yes, sir.

The said statement is offered in evidence by counsel for defendant, marked Defendant's Exhibit B; is admitted subject to the objection and cross-examination by counsel for plaintiff, and is as follows:

117 The Pennsylvania Railroad Company.

Statement of Cars Placed at Bituminous Coal Mines in Tyrone Region.

Pennsylvania Railroad Lines East of Pittsburg and Erie.

	Individual.	Company coal.	System.	Commercial.		
				For'gn.	Box.	Total.
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

By Mr. GOWEN:

Q. This statement, I understand, shows in the first column under the head of "Rating in Cars," the total rating in cars at the mines in the Tyrone region? I am now referring to a third statement which I show you, and which is marked "Defendant's Exhibit C."

A. Yes, sir.

Q. During the months covered by the statement?

A. Yes, eight months, from September, 1902, to April, 1903.

Q. Both inclusive?

A. Both inclusive.

Q. Then it shows, in the second column, the total cars placed in the region?

A. Yes, sir.

Q. During those eight months?

A. Yes, sir.

Q. Then it shows, in the third column, the percentage which the cars placed bore to the total car rating during those months?

118 A. Yes, sir.

Q. In the last column, under the head of "Cars placed less fuel and individual cars in region," it gives the cars placed in each month in this period other than fuel and individual cars?

A. Yes, sir.

Counsel for defendant offers in evidence the last mentioned paper, marked Defendant's Exhibit C.

Paper admitted subject to the objection and cross-examination of counsel for plaintiff.

The said paper, Defendant's Exhibit C, is as follows:

The Pennsylvania Railroad Company.

Tyrone Region.

(With Snow Shoe Region Eliminated.)

1902.	Rating in cars.	Total cars placed.	Percentage.	Cars placed, less fuel and individual, in region.
Sept.	18,475	6,642	35.9	1,862
Oct.	19,409	7,666	39.4	2,091
Nov.	18,043	6,814	37.7	812
Dec.	18,872	7,222	38.2	733
1903.				
Jan'y	19,905	6,747	33.8	559
Feb'y	17,758	6,363	35.8	452
Mar.	19,266	7,824	40.6	1,381
Apr.	18,716	6,171	32.9	1,371
Total ..	150,444	55,449	36.9	9,261

Evidence closed.

119 *Charge of the Court.*

McPHERSON, *J.*:

GENTLEMEN OF THE JURY: You will probably be relieved to know that you will not have anything more than a formal duty to perform in this case. As you will have observed, it presents some rather intricate and difficult questions growing out of the inevitable conflict of the set of facts that have been presented here. I think it would be scarcely possible for you to do justice to this case, for reasons which will present themselves to your minds as well as to mine. The parties have fortunately relieved you from any difficulty by agreeing that you may render a special verdict. I will therefore ask you to render a special verdict in this form:

We find as a fact that the amount of the plaintiff's claim is correct and is contained in its Exhibit 2, and is:

Principal, $51,640.60;

Interest, 15,515.49;

Total, $67,156.09.

Said amount being ascertained in the way and manner in said exhibit set forth, together with the evidence explaining and referring to the same.

If the Court should be of opinion that the questions of law involved in the case are, in whole or in part, with the plaintiff, judgment may be entered for the above amount or for such smaller sum as, in the opinion of the Court, the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant. Are you content to render such a verdict?

The JURY: Yes, your Honor.

The points of the plaintiff and defendant respectively are
120 not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant.

Said points are as follows:

Plaintiff's Points.

1. In periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Railroad Company could not furnish all the cars required for the shipment of coal, by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal, among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was entitled each day to have assigned to its use the number of cars which its percentage of all such available cars, would award to it in accordance with the system of distribution in effect.

2. If the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the Court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant.

121 The damages should be estimated as follows:

The jury should first determine the difference in tonnage between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region.

This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts of shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled.

Defendant's Points.

First Point. It was the duty of the defendant to place at the mines of the owners thereof all individual cars so-called; that is, cars which were the property of any of its operators, and this duty it was bound to perform regardless of the question whether by so doing it gave to such operators a larger proportionate share of cars than it was able to give on the same day to other operators.

Second Point. It was the duty of the defendant to place at the mines of those operators to whom such cars were consigned all foreign railroad cars which were received by it to be placed at such mines in order that these cars might be loaded with fuel coal for the companies owning such cars, and this without regard to the consideration whether or not by so doing these operators received a larger proportionate number of cars than did the other operators in the region.

Third Point. The defendant had a right to place cars to be loaded with fuel for its own use at the mines from which it was drawing its supply coal, even though by so doing these mines
122 received a larger proportionate number of cars than the other mines in the region.

Fourth Point. The burden is upon the plaintiff to show that the defendant failed to deliver to it its proportion of the cars subject to distribution or allotment among the shippers of coal in the Tyrone region. As the plaintiff has not established this, it is not entitled to recover, and your verdict should be for the defendant.

Fifth Point. There is no evidence under which the jury can find that during the entire period of the action; that is, from March, 1902, to December, 1905, both inclusive, the plaintiff did not receive its full proportion of the cars placed at the mines in the Tyrone region, and as the burden was upon it to show this fact, it is not entitled to recover, and your veridct should be for the defendant.

Sixth Point. The plaintiff was only entitled to its proportion of the cars belonging to the defendant and controlled by it, exclusive of cars used for the movement of its own fuel sent into the Clearfield region. It is its duty to supply you with evidence of what was the number of cars so sent and that it received less than its proportion thereof.

Seventh Point. Even though you could find from adequate evidence that the plaintiff received less than its proportion of such cars so sent, it is not entitled to recover the difference between the cost to it of the coal representing the deficiency and what it paid for such coal sold by it to others.

which was all the evidence offered by both the plaintiff and the defendant, to the admission of parts of which said evidence exceptions were allowed to the plaintiff, as set forth in the stenographer's transcript of evidence above, and thereupon the Court charged the jury as follows (Prout, Charge of Court, see page 119);
123 and in accordance with the said charge the jury did render the special verdict as instructed by the Court and embodied

in said charge, and thereupon the counsel*f* for the said plaintiff did then and there except to the admission of parts of said evidence, as set forth above, and did also except to the Court's refusal to answer specifically the points submitted by the said plaintiff, as set forth in the stenographer's transcript of said charge and opinion as above; and the plaintiff thereafter having moved the Court to enter judgment in its favor upon the said special verdict, by motion in writing duly filed, as follows: "And now, to wit, this 29th day of November, 1909, the plaintiff in the above case, the Morrisdale Coal Company, through its attorneys, Chester N. Farr, Jr., and William A. Glasgow, Jr., moves that judgment be entered in favor of the plaintiff against the defendant on the special verdict entered in the sum of Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09)," and the said defendant, on the 31st day of January, 1910, having moved the Court to dismiss the plaintiff's case on the ground that the Court had no jurisdiction thereof, and the Court having granted said motion, as appears by the record, and the plaintiff having excepted to the granting of said motion, and inasmuch as said charge and opinion, and the evidence and exceptions thereto so excepted to, did not appear upon the record, the said counsel for the said plaintiff did then and there tender this, its bill of exceptions to the rulings of the Court, to which exceptions were granted to the plaintiff as set forth above, and to the opinion and charge of the Court, and to the action of the Court in granting the motion to dismiss plaintiff's case for want of jurisdiction, and counsel for the plaintiff further requested that the seal of the Court, aforesaid, should be put to the same, according to the form of the statute in such case made and provided, and thereupon the aforesaid Judge, at the request of the said
124 counsel for the said plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 10th day of February, A. D. 1910.

JOHN B. McPHERSON, *Judge.* [SEAL.]

(Endorsed: In the Circuit Court of the United States, Eastern District of Pennsylvania. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Bill of Exceptions. Presented Feb. 9-10. J. B. McP. Agreed to. J. G. Johnson, Att'y for Def't. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion for Judgment on Behalf of Plaintiff.

And now, to wit, this 29th day of November, 1909, the plaintiff in the above case, the Morrisdale Coal Company, through its attorneys, Chester N. Farr, Jr., and William A. Glasgow, Jr., moves that judgment be entered in favor of the plaintiff against the defendant on the special verdict entered in the sum of Sixty-
125 seven thousand one hundred fifty-six dollars and nine cents ($67,156.09).

Respectfully submitted,

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Pro Plaintiff.

(Endorsed: C. C. of U. S. for E. D. of Pa. April Sessions, 1908. No. 102. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Motion for Judgment on Behalf of Plaintiff. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff. Filed Nov. 29, 1909. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now, this thirty-first day of January, 1910, defendant moves the Court to dismiss this action for want of jurisdiction to entertain the same.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendant.

(Endorsed: No. 102. April Sessions, 1908. Circuit Court of the U. S. Eastern Dist. of Penna. Morrisdale Coal Company vs. Pennsylvania Railroad Co. Motion to dismiss for want of jurisdiction. Francis I. Gowen, John G. Johnson, for defendant. Filed Jan. 31, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

126 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion to Dismiss for Want of Jurisdiction.

McPHERSON, *District Judge:*

This suit was brought to recover damages from the Pennsylvania Railroad Company for a practice that is alleged to be in violation of the Act to regulate commerce. The plaintiff's coal mine is in the Clearfield region of this state, and the defendant carries much of the product in commerce between the states. The practice complained of was a method of distributing coal cars among the mines of the region at times when the supply of cars fell short. The plaintiff averred that an undue preference was given thereby to other miners and shippers in the same region, while it was obliged to bear an unreasonable burden. This being forbidden by section 3, the plaintiff sued to enforce the liability referred to in section 8, and claims the right to recover, in spite of the conceded fact that no complaint was made in the first instance to the Interstate Commerce Commission. The suit is said to be brought under the permission given by section 9; a trial was had before a jury, and a special verdict was rendered in favor of the plaintiff. The right to judgment,
127 however, was still undetermined when the present motion was made; and this right was believed at the trial to depend upon the decision of certain questions that are referred to in the verdict. Among these, it was a vital question whether the method that was followed by the railroad company during the years 1902-1905 for distributing its available supply of cars during periods of shortage imposed unreasonable disadvantage upon the plaintiff, or gave unreasonable preference to its competitors in the Clearfield region. Briefly, the method was this: The railroad company determined the capacity of the various mines in the region by a computation that is not complained of, and thus arrived at the proportion of cars to which the plaintiff and other miners would be entitled when cars were too few to meet the demand completely. This proportion was applied to the deficient car supply in the following manner; Each day the total number of cars available for the whole region was ascertained by the railroad company, and a distribution sheet was then made up, allotting to the plaintiff and the other miners the cars to which the defendant's method of distribution showed them to be entitled. The total available cars consisted of four classes; those that belonged to private individuals or corporations; those that were to be filled with coal that the railroad company had bought for its own use as fuel; those that belonged to foreign

railroad companies, and were also to be filled with coal that these companies had bought for their own use as fuel; and system, or company, cars—meaning such cars as did not belong to either of the first three classes but were available generally for the carriage of coal. If the railroad company had distributed the total number of these four classes ratably among the mines according to capacity, the plaintiff would not be now complaining. But a different method was pursued. From the total number of available cars the defendant deducted the aggregate of the first three classes—assigning the private cars to the individuals or corporations who owned
128 them or were entitled to use them, and assigning its own fuel cars and the fuel cars of foreign railroads to the mines from which the supply was to come—and distributed the fourth class alone in proportion to capacity. The result was, that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class while the plaintiff received only its ratable proportion of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes. Averring injury by this method of distribution, and asserting that the total number of the four classes without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination.

It will at once be observed that the suit requires a court and jury to decide whether the defendant's method of distribution offended against the Act. The questions are, (1) whether this method gave a preference to any particular person, company, firm or corporation, or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable. These are stions of fact, and manifestly cannot be decided merely by considering what methods may have been held to be lawful, when adopted and applied by other railroads under other circumstances. There is no "rule of law," that requires the aggregate of available cars always and everywhere to be divided ratably in times of shortage. Even if it be conceded, that whenever a dispute upon the subject has been presented to a court or to the Commission, this method of distribution has usually been de-
129 cided to be the fairest, it does not follow necessarily that the method is to be applied in the next dispute that arises. It is perhaps more nearly correct to speak of the "rule" as similar to a working hypothesis. It may do to start with, if, or since, it represents a fairly general opinion concerning what is just and equitable; but the circumstances of a given case may require the rule to be modified, and would certainly require it to be modified, if, instead of avoiding, it would cause, an undue preference or disadvantage. What is undue or unreasonable is ordinarily a pure question of fact; and, where such a question is presented, it is necessary to be cautious in applying a rule that may have been properly used to decide a

similar question, but under different circumstances. And, since the question is of fact, there will always be the danger that different courts and juries may reach different conclusions, even when the evidence and the facts are essentially the same. Different minds occupy different points of view, and may therefore see the same question from opposite angles with varying results. Moreover, as a question of fact can only be resolved by evidence, it may easily happen that the quantity or quality of evidence may differ in one trial from another, so that recovery by one plaintiff and failure by another may both be just—one having evidence enough, while the other has too little, to support a verdict.

These remarks may perhaps serve as a preface to the examination of two or three recent decisions of the supreme court, which deal with some of the difficulties that beset the effort to apply section 3 by the piecemeal procedure of unconnected trials before a court and jury. Facing these difficulties, and influenced no doubt by other considerations as well, the court has, I think, announced important conclusions upon the construction of the Act; and it is therefore necessary to examine carefully the decisions referred to, and to note the course of reasoning by which they have been
130 reached. The first is Texas & Pacific Railway Company vs. Abilene Cotton Oil Co., 204 U. S. 426. This has to do with an unreasonable rate, but much that is said by the court is also applicable to a dispute like this, where the injury is charged to an unreasonable practice. The oil company was compelled to pay a rate which it believed to be more than was reasonable, and the suit was brought to recover the excess. The action was at common law in a court of the state, and the railway defended, inter alia, by averring, and afterwards proving, that the shipment was inter-state, and that the rate complained of had been established and posted as required by the Act to regulate commerce. Nevertheless, the Texas court of civil appeals decided, that, as the rate had been found by the trial court to be unreasonable, the oil company had a right to recover under the principles of the common law, altho the rate had been established by the carrier under the federal statute. In other words, the state court entertained a suit, the purpose of which was to pronounce a rate unreasonable, in spite of the fact that the rate had been established and posted under the provisions of the Act, and in spite also of the fact that the reasonableness of the rate had not been passed upon by the Commission. A question was thus presented which the supreme court states in the following language (p. 436):

The fundamental question is "the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, altho the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the Act to regulate commerce, and which it was the duty of the carrier, under the law, to enforce as against shippers."

The court conceded that a shipper might recover
131 damages at common law if the carrier charged an unreasonable rate, and that such damages might properly be measured

by the excess above a proper rate. And it is further conceded that the oil company was clearly suing upon a right that was valid at common law, and that the Act to regulate commerce had not expressly taken the right away. But it was held that the right was nevertheless taken away impliedly, altho the court agreed that repeals by implication are not favored, and that a statute should not be construed to take away a common law right unless such a result is imperatively required. This ruling in favor of the implied repeal is supported by showing that the Act provides complete machinery for the protection of shippers, and has substituted its own remedies for the remedies of the common law. To sustain this position, the court summarizes the statute as follows:

"The Act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the Act and the punishments which it imposed were directed not only against carriers but against shippers, or any persons who, directly or indirectly, by any machination or device, in any manner whatever, accomplished the result of producing the wrongful discriminations or preferences which the Act forbade. It was made the duty of carriers subject to the Act to file with the Interstate Commerce Commission created by that Act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was en-
132 dowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the Act. To that end it was made the duty of the district attorneys of the United States, under the direction of the attorney general, to prosecute proceedings commenced by the Commission to enforce compliance with the Act. The Act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons thereby injured for the full amount of damages sustained in consequence of any such violation of the provisions of this Act * * *' Power was conferred upon the Commission to hear complaints concerning violations of the Act, to investigate the same, and, if the complaints were well-founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out

in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission."

Pointing out that the Act was undoubtedly intended to redress the wrongs resulting from unjust discrimination and undue preference in regard to rates, and that the object was to be accomplished by compelling the carrier to establish schedules of reasonable rates that should apply uniformly to all, and should not be departed
133 from until the schedule was changed in the manner provided by the Act, the court goes on to say:

"When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute, and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the Act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the commission, would give rise to a change of the schedule rate, and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the Act and the remedial provisions which it created, which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established
134 rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discriminations, and afford, moreover, a ready means

by which, through collusive proceedings, the wrongs which the st
was intended to remedy could be successfully inflicted. Indeed
reason can be perceived for the enactment of the provision endo
the administrative tribunal which the Act created with power, on
proof, not only to reward reparation to a particular shipper, bu
command the carrier to desist from violation of the Act in the fu
thus compelling the alteration of the old or the filing of a new sc
ule, conformably to the action of the commission, if the power
left in the courts to grant relief on complaint of any shipper, upo
theory that the established rate could be disregarded and be tre
as unreasonable, without reference to previous action by the Com
sion in the premises. This must be, because, if the power exi
in both courts and the Commission to originally hear complaint
this subject, there might be a divergence between the action of
Commission and the decision of a court. In other words, the es
lished schedule might be found reasonable by the Commis
135 in the first instance and unreasonable by a court acting
inally, and thus a conflict would arise which would re
the enforcement of the Act impossible."

But, as the argument had been made that section 9 permits an
jured shipper either to complain to the Commission, or to sue at
merely compelling him to elect which remedy he will adopt, and
the suit under review had been brought in the exercise of such
tion, the court replied to this contention in the following signifi
language:

"Nor is there merit in the contention that sec. 9 of the Act com
to the conclusion that it was the purpose of Congress to confer po
upon courts primarily to relieve from the duty of enforcing the es
lished rate by finding that the same as to a particular perso
corporation was so unreasonable as to justify an award of dama
True it is that the general terms of the section, when taken al
might sanction such a conclusion, but, when the provision of
section is read in connection with the context of the Act, and in
light of the considerations which we have enumerated, we think
broad construction contended for is not admissible. And this
comes particularly cogent when it is observed that the power of
courts to award damages to those claiming to have been injured
provided in the section, contemplates only a decree in favor of
individual complainant, redressing the particular wrong asserte
have been done, and does not embrace the power to direct the car
to abstain in the future from similar violations of the Act; in ot
words, to command a correction of the established schedules, wh
power, as we have shown, is conferred by the Act upon the Comm
sion in expressed terms. In other words, we think that it inevita
follows from the context of the Act that the independent right of
individual originally to maintain actions in courts to obt
136 pecuniary redress for violations of the Act, conferred by
9th section, must be confined to redress of such wrongs as c
consistently with the context of the Act, be redressed by cou
without previous action by the Commission, and, therefore, does
imply the power in a court to primarily hear complaints concern

wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

Several decisions are then reviewed—especially Railway vs. Hefley, 158 U. S. 98, and Railway vs. Mugg, 202 U. S. 242—and the court continues (p. 445):

"In view of the binding effect of the established rates upon both the carrier and shipper, as expounded by the two decisions of this court just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement"—that is, as I understand it, an agreement to charge a rate different from the rate contained in its published schedule—"when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in a Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established
137 schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands."

It is then declared that section 22, which preserves the "remedies now existing at common law or by statute," cannot in reason be construed as preserving to a shipper a common law right which would be absolutely inconsistent with the statute:

"In other words, the Act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, when other

appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act."

And the conclusion of the whole matter is thus stated on page 448:

* * * "A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable." * * *

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This decision deals specifically with the subject of rates, but Baltimore & Ohio Railroad Company vs. United States ex rel. Pitcairn Coal Co. has to do with the subject now in hand—the distribution of coal cars in time of shortage. The decision was rendered on January 10, 1910, and the opinion is written by Mr. Justice White, who also spoke for the court in the case of the Abilene Oil Co. The suit was begun in the United States circuit court for the district of Maryland by a petition for a mandamus. The writ was asked for by the Pitcairn Coal Co. (apparently joined afterwards by other petitioners) in order to compel the Baltimore & Ohio Railroad Co. to change its method of distributing coal cars among certain mines that were served by the railroad. It is unnecessary to describe the method in detail. It differed in several particulars from the method now complained of, but it was alleged to produce a similar effect, namely, an undue preference in favor of certain miners and shippers, and an undue discrimination against others. The railroad company denied the averments of preference and discrimination, and asserted the validity of its method and rules of distribution. The issue thus formed required an elaborate and prolonged inquiry into the facts, and in the end the circuit court made an order sustaining the railroad's method except in one particular—the company was decided to be wrong in deducting private cars before the pro rata distribution was made. The court of appeals went further and decided that the railroad company's method was also wrong in several other particulars—inter alia, in deducting its own fuel cars and the fuel cars of foreign railroads before making pro rata distribution to the mines in the district. The grievance of the Pitcairn Co. had not been laid before the Commission, and the situation presented to the supreme court by all these facts is referred to in the following paragraphs from the opinion:

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"One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the Act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such, that, even without the assigned error to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the

relief prayed consistently with the provisions of the Act to regulate commerce, and to that subject we therefore at once come.

"To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve the acts of the Baltimore & Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern inter-state commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the Act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the
140 Act is sought and an order, by way of mandamus, was invoked, and was allowed which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of inter-state commerce in the future."

This being the situation and these being the questions, the court goes on to say:

"When the situation is thus defined, we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

The court declares that the controversy is controlled by the considerations that governed the decision in the case of the Abilene Oil Co.; and points out that the relief there prayed for was denied because it was inconsistent with the Act to regulate commerce—the inconsistency being found in the fact that the Act made the rate then in controversy of controlling force until it should be pronounced unreasonable by the Commission itself, on a complaint made to that body. Therefore the rate could not be declared unreasonable—either directly or inferentially—in a proceeding before another tribunal. Any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the Act, and in effect cause the Act to destroy itself.

But the Baltimore & Ohio Co.'s case arose in January, 1907, after the amendments of 1906 had been passed, and the court therefore proceeds to the consideration of these amendments, saying:

141 "The ruling there made (in the Abilene case) dealt with the provisions of the Act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the Act by that ruling; since, by section 15, as enacted by the

amendment of June 29, 1906, the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering section 15 in the case of Illinois Central Railroad Co. vs. Interstate Commerce Commission, just decided, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the Act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well-founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint.

142 The Commission finds from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail. If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

Illustrations of actual confusion growing out of rulings by the courts and rulings by the Commission upon the same subject are then given, and the opinion passes on to consider the effect of section 23, which provides for the remedy by mandamus. This is the section that had been invoked by the Pitcairn Co., and at first blush its language certainly seems to give the courts primary jurisdiction to issue the writ whenever a carrier violates the Act by preferential rates or practices. But the supreme court declared that the apparent scope of the section must obviously be restricted so that it may harmonize with the rest of the Act and not destroy one of its main purposes. Thus restricted, it does not give the remedy by mandamus primarily, but only (when the remedy is available at all) after the Commission has acted upon the complaint. To use the court's own language:

"As it was settled in the Abilene case that the right to question in the courts the rates established in accordance with the act to regulate commerce, without previous resort by complaint to the Commission in order to determine their unreasonableness, would be de-
143 structive of the Act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in section 23, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the Act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the Abilene case. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the Act to regulate commerce as to preferences and discriminations were far reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result. Section 23, here relied upon, was not part of the original Act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the Act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the Act by supplying efficient means for giving effect to the orders of the Commission made in the exertion of the authority conferred upon that body. To that end one of the amendments, section 15, gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute,
144 and, to enforce these provisions, penalties and forfeitures are provided. Sec. 16. It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require

a prerequisite exertion of power by that body, or to compelling performance of duties which plainly arise from the obligatory f which the statute attaches to orders of the Commission, rend within the lawful scope of its authority, until such orders are aside by the Commission or enjoined by the courts."

And the rulings in the Baltimore & Ohio Co.'s case are emp sized by another decision that was announced on the same day in opinion written by the same justice—Interstate Commerce Comm sion vs. Illinois Central Railroad Co. In that case a miner shipper of coal complained to the Commission that the railro method of distributing cars when the supply was short resulted preference and discrimination—especially because the company ducted private cars and foreign railway fuel cars before mak distribution to the mines along its road. The Commission was as

by the company to consider in the same proceeding the f
145 ther question whether its own fuel cars might be deduc
before distribution was made, and accordingly the Comm sion dealt with all of these three classes. Its order directed the co pany to give up the practice of deducting any of these classes bef making distribution, and (in the exercise of the power given by t amendments of 1906) directed the carrier to include all the availa cars in a total for ratable distribution, and to include them fo period of two years. The railroad company sought to enjoin t order, and the case was heard by three circuit judges of the seven circuit. They decided (173 Fed., 930) that the Commission w right in directing the company to include private cars and forei railway fuel cars in the total that were to be distributed ratably the mines, but was wrong in directing it to include its own fuel c in that number. The Commission appealed, and the supreme co sustained the appeal, deciding that the circuit court should not ha interfered with the order, so far as the company's own fuel cars w concerned. (The railroad did not appeal, and the other two clas of cars were therefore not specifically considered.) The point th should now be observed is this; the supreme court distinctly puts t decision upon the single ground that the Commission had power make the order in question; and refuses to rest it in any degree up the ground that the order was either wise or expedient. This a pears clearly in the following paragraphs:

"In consequence of one of the comprehensive amendments to t Ace to regulate commerce, adopted in 1906, (sec. 15, Act June 1906, 34 Stat. 589), it is now provided that 'all orders of the Co mission, except orders for the payment of money, shall take eff within such reasonable time, not less than thirty days, and shall co tinue in force for such period of time not exceeding two years, shall be prescribed in the order of the Commission, unless the sa

shall be suspended or set aside by a court of competent ju
146 diction.' The statute endowing the Commission with la
administrative functions, and generally giving effect to orders concerning complaints before it without exacting that they previously submitted to judicial authority for sanction, it becom

necessary to determine the extent of the powers which courts may exert on the subject.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Telegraph Company vs. Adams, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order under our conception as to whether the administrative power has been wisely exercised.

"Power to make the order and not the mere expediency or wisdom of having made it, is the question."

The court thereupon considered and sustained two propositions: (1), The Act gave the Commission authority to regu-
147 late the distribution of company fuel cars in times of shortage as a means of preventing undue preference or undue discrimination; and (2), The order complained of was within the authority thus given. But the expediency of the order was not passed upon at all, the court saying, inter alia:

"The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is brought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that

body to consider complaints as to violation of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

If this decision be read, as it must be, in connection with
148 the case of the Baltimore & Ohio Railroad Company and with Texas & Pacific Railway Company vs. Abilene Oil Co., the conclusion seems to be unavoidable, that complaints of unreasonable rates and of unreasonable practices (at least when such rates and practices are general, and apply to whole classes of shippers) must alike be heard in the first instance by the Commission; and that the courts have no power to entertain such complaints until the Commission's order thereon is brought before them for appropriate action. And when such an order is finally brought before a judicial tribunal, the inquiry whether the order should be suspended or set aside must be limited to considering.

"*a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, * * * whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The inquiry is not to be answered by deciding, that in the judgment of the court the order is, or is not, either wise or expedient; if the Act to regulate commerce has given the Commission power to deal with the subject, and if the order complained of is within the power, the action of the Commission is to stand.

But the foregoing cases were all concerned with rates or practices that existed when the proceedings were begun, while it is conceded that the present defendant changed the method in controversy on or about January 1st, 1906, more than a year before the suit
149 was brought. The action therefore being solely for damages, and for damages growing out of a practice that has ceased, the plaintiff insists that the decisions of the supreme court do not apply, and that section 9 of the Act gives the right to sue in the courts at the election of the injured party. Evidently, this also is a question of great importance, and the judgment of this court is not likely to have much effect upon its solution. It can only be determined satisfactorily by the supreme court, and I should not feel that I were evading my duty if I merely entered a judgment and speeded the cause on its way to an ultimate decision. But I may perhaps indicate very briefly why I think that the reasoning of these cases leads to the conclusion that the circuit court does not possess primary jurisdiction of the present case.

It can no longer be doubted, as a general proposition, that the Commission is charged primarily with the jurisdiction and the duty

to examine rates and practices, and to determine whether they conform to the Act. And it is probably safe to say also, that because of the diversity of situations and circumstances that inevitably affect rates and practices the Commission is likely to find it impossible to lay down general rules that will apply without modification to every possible dispute in a given class. Hence—to speak now only of the question in hand—the lawfulness of the defendant's practice during 1902-1905 must be determined by considering the situation and the circumstances that prevailed in the Clearfield region during the years in question. The situation being thus considered, if the practice was preferential or discriminating it violated the Act. But what tribunal is to decide whether an offence has been committed? Clearly, if the practice were now in force, the Commission; and it is I think conceded that the Commission might then not only forbid the practice in the future, but might award reparation for the injury
150 done in the past. The basis of both these orders, however, would necessarily be a finding of fact—that the practice was preferential or discriminating—and this is an administrative finding which the Commission alone seems to have the power to make in the first instance. The right to inquire into this subject has not been confided primarily to the courts, and such power of reviewing the Commission's order as the courts may possess does not extend to its wisdom or discretion.

Since, therefore, the Commission alone has the power to decide primarily whether a particular method of distributing coal cars in case of shortage is preferential, I do not believe that the power is automatically transferred to the courts as soon as the carriers substitute another method, and merely for the reason that the substitution has been made. The procedure of submitting the question of discrimination to different courts and juries has been authoritatively declared to be objectionable; but if it must nevertheless be followed in every case where the damages claimed were caused by a practice that has been changed, the uncertainty of results to which the supreme court has referred will bring about the very discrimination which the Act seeks to avoid. If one injured shipper recovers a verdict and another fails; or if one recovers a sum calculated according to a particular rule, and the sum awarded to his neighbor is calculated according to a different rule; an obvious discrimination among the claimants must result, for the theory of all the verdicts must be that the sums recovered fully repair the damages suffered, while it is evident that reparation is in fact partial or unequal. Inequality in recovery would necessarily produce discrimination. If, on the other hand, such claims must be submitted in the first instance to the Commission, they will be acted upon uniformly, will be adjusted according to the same rule—a rule that will presumably be adopted after a full and comprehensive view of the whole situation
151 and of all the relevant circumstances—and the damages will be awarded, not arbitrarily or capriciously, but by the application of the same standard. In a word, and without repeating the language of the supreme court that seems to me to justify the conclusion, I hold that the Commission has the primary jurisdiction to award reparation for such damages as may have been caused by a

preferential practice in distributing coal cars in case of shortage; a
that the circuit court has not the primary power to award su
damages, even altho they may have been caused by a practice th
did not prevail at the time when the suit was brought. If the plai
tiff's contention is sound it follows that two irreconcilable results m
come to pass. If section 9 applies to a situation like this—where t
practice complained of has ceased—a shipper who elects to sue
law is thus turning to a tribunal upon which his election may
said to confer exclusive jurisdiction of his complaint. But if anoth
shipper has previously been obliged to go before the Commission
the obnoxious practice being then in force—it is clear that this shi
per (who is seeking redress for the same wrong) has addressed t
proper tribunal, for in that event it is conceded that the Commissi
had exclusive primary jurisdiction of the subject matter. Whc
decision is to prevail? It might easily happen that after one shipp
had appealed to the Commission a carrier might give up the pra
tice—either before or after the Commission had passed upon
validity—and that other shippers might thereupon bring suits
law to recover damages, as the present plaintiff has done. If the Co
mission has no power to entertain the complaints of these shippe
because the practice has ceased—and this is the plaintiff's position
the courts must have complete jurisdiction, and must therefore
able to decide whether the practice complained of is preferenti

But, as the Commission had undoubted primary jurisdicti
152 of the complaint that was first made, does the ruling of t
Commission govern in case the practice should be sustain
in whole or in part? Or does the ruling of the court govern, in ca
the practice should be condemned, either in whole or in part? Und
the Illinois Central's case the decision of the Commission upon su
a subject is declared to be final: the wisdom or discretion of t
order is not to be reviewed by the courts; and yet a ruling that is th
adjudged to be final would nevertheless be practically subject to
view at the hands of a jury or of several juries, and might be whol
set at naught.

If it be asked—What then becomes of the power to sue for da
ages that is given by section 9 of the Act?—the answer is apparent
to be found in the following language from the Abilene Oil Co
pany's case (p. 442):

"In other words we think it inevitably follows from the context
the Act that the independent right of an individual originally
maintain actions in courts to obtain pecuniary redress for violatio
of the Act, conferred by the ninth section, must be confined to
dress of such wrongs as can, consistently with the context of the A
be redressed by courts without previous action by the Commissio
* * *"

There are wrongs to which a shipper may be subjected that do n
need previous action by the Commission. For example—to give
single illustration—isolated acts of oppression or extortion, direct
against individuals, might in all probability be redressed by suit
the election of the injured shipper. But where a practice that
applied alike to all shippers, or to all of a class, is complained of b
cause its effect is nevertheless averred to be preferential, a differe

situation is presented. There the Act has given to the Commission a primary jurisdiction over the subject matter, in order that redress may be intelligent, complete, and uniform: and this I believe to be true whether redress is sought before, or after, the practice has been given up.

153 The defendant's motion to dismiss the suit for want of jurisdiction must be granted.

(Endorsed: 102 Apr. Sess., 1908. Morrisdale Coal Co. vs. Penna. R. R. Co. Opinion. Filed Feb'y 5, 1910. Henry B. Robb, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Allowance of Exception to Plaintiff.

And now, to wit, this 7th day of February, 1910, on motion of Chester N. Farr, Jr., and William A. Glasgow, Jr., attorneys for the Morrisdale Coal Company, plaintiff in the above case, the Court allows the plaintiff the following exception:

1. Exception to the action of the Court in granting defendant's motion to dismiss this suit for want of jurisdiction.

JOHN B. McPHERSON, *Judge.*

(Endorsed: U. S. Circuit Court of E. D. of Pa. No. 102 of Apr., 1908. Morrisdale Coal Co. vs. Penna. R. R. Co. Allowance of Exception for Pl'ff. Filed Feb. 8, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

154 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Entry of Judgment.

To the Clerk of the Circuit Court of the United States:

SIR: Enter judgment in the above case in favor of the defendant and against the plaintiff in accordance with the opinion of the court filed.

JOHN G. JOHNSON,
Counsel for Defendant.

February 10, 1910.

Judgment.

And now, this tenth day of February, 1910, in accordance with præcipe filed, judgment is hereby entered in the above entitled case in favor of defendant and against the plaintiff in accordance with the opinion of the Court.

Attest:

LEO A. LILLY,
Deputy Clerk.

(Endorsed: U. S. Circuit Court of E. D. of Pa. Morrisdale Coal Co. vs. Penna. R. R. Entry of judgment for defendant. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

155 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Assignments of Error.

The plaintiff in this action, in connection with the petition for a writ of error, makes the following assignments of error, which it avers have occurred in the rulings of the Court, as appears by the record of this cause, to wit:

1. That the learned Court erred in sustaining the motion of the defendant to dismiss this cause for want of jurisdiction.

2. That the learned Court erred in dismissing this cause for want of jurisdiction, and in entering judgment in favor of defendant thereon.

3. That the learned Court erred in not entering judgment in favor of the plaintiff in the sum of Sixty-seven thousand, one hundred and fifty-six dollars and nine cents ($67,156.09).

4. That the learned Court erred in not affirming the plaintiff's first point which read as follows:

"1. In periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Rail-
156 road Company could not furnish all the cars required for the shipment of coal, by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal, among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was

ntitled each day to have assigned to its use the number of cars which its percentage of all such available cars, would award to it in accordance with the system of distribution in effect."

5. That the learned Court erred in not affirming plaintiff's second point, which read as follows:

"2. If the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant.

The damages should be estimated as follows:

The jury should first determine the difference in tonnage
157 between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region.

This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts of shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled."

Wherefore the plaintiff prays that the judgment of the Court may be reversed.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Plaintiff.

(Endorsed: No. 102. April Sessions, 1908. U. S. C. C. E. D. of Pa. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Assignments of Error. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., Att'ys for Pltf. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

158 In the Circuit Court of the United States for the Easte
District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the Circuit Court of the Unite
States for the Eastern District of Pennsylvania:

The petition of Morrisdale Coal Company, a corporation of th
State of Pennsylvania, respectfully represents:

That it is the plaintiff in the above entitled action, and that on th
17th day of November, 1909, a special verdict was entered in th
above cause, finding in favor of your petitioner in the sum of Sixty
seven thousand, one hundred and fifty-six dollars and nine cent
($67,156.09), and reserving certain points of law for the consider
tion of your Honorable Court, as will appear from the record hereo
to which reference is hereby made.

And, as will further appear from the said record, on the 31st da
of January, 1910, the defendant herein filed a motion to dismiss th
plaintiff's case on the ground that your Honorable Court had n
jurisdiction thereof, which motion was granted by your Honorabl
Court, and the case dismissed on the 5th day of February, 1910, an
judgment was entered in favor of the defendant, all of which appea
upon the said record.

And your petitioners represent- that in such judgment an
159 the proceedings had prior thereto in this cause, certain erro
were, in the opinion of your petitioner, committed in th
said Court to the prejudice of your said petitioners, all of which wi
more fully and in detail appear with the assignments of error whic
are filed with this petition.

Wherefore your petitioner prays that a writ of error may issu
in this behalf out of the United States Circuit Court of Appeals fo
the Third Circuit, for the correction of errors so complained o
and that the said judgment may be reversed and full and comple
justice may be done to your petitioner in the premises, and that th
transcript of the record, proceedings and papers in this case, dul
authenticated, may be sent to the United States Circuit Court o
Appeals.

And, as in duty bound, your petitioner will ever pray, etc.

MORRISDALE COAL CO.,
By CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Plaintiff.

Before McPherson, J.

Petition allowed.
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Febr'y 10, 1910.

(Endorsed: No. 102. April Sessions, 1908. U. S. C. C. E. D. of Pa. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Petition for Writ of Error and Order of Allowance. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., Att'ys for Pl't'f. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

160 Know all men by these presents, That we, Morrisdale Coal Company, as principal, and The United States Fidelity and Guaranty Company as surety, are held and firmly bound unto Pennsylvania Railroad Company in the full and just sum of two hundred and fifty dollars, to be paid to the said Pennsylvania Railroad Company, its certain attorney, successors, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of February in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a suit depending in said Court, between Morrisdale Coal Company and Pennsylvania Railroad Company, a judgment was rendered against the said Morrisdale Coal Company, and the said Morrisdale Coal Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Pennsylvania Railroad Company, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such that if the said Morrisdale Coal Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

161 Sealed and delivered in the presence of—

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By J. WALTER ZEBLEY,
Resident Vice-President.

Attest:
FRANK M. FLYNN,
Resident Secretary.

The surety hereby waives the signature of the principal.
J. WALTER ZEBLEY, *R. V. P.*

Before McPherson, J.

Bond approved.
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.
February 10, 1910.

162 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Henry B. Robb, Clerk of the Circuit Court of the United Stat of America for the Eastern District of Pennsylvania, in the Thi Circuit, do hereby certify the foregoing to be a true and faithf copy of the original Pleas and Proceedings in the case of the Morri dale Coal Company v. Pennsylvania Railroad Company, No. 10 April Session, 1908, on file and now remaining among the recor of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name an affixed the seal of the said Court at Philadelphia, this 18th day February, in the year of our Lord one thousand nine hundred an ten, and of the Independence of the United States the one hundr and thirty-fourth.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

163 In the United States Circuit Court of Appeals for the Thi Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

And afterwards, to wit, on the twenty-fourth day of March, 191 come the parties aforesaid by their counsel aforesaid, and this ca being called for argument sur pleading and briefs and the Cou not being fully advised in the premises, takes further time for th consideration of the same.

And afterwards, to wit, on the seventeenth day of November, 191 come the parties aforesaid by their counsel aforesaid, and the Cou now being fully advised in the premises, renders the following d cision:

164 United States Circuit Court of Appeals, Third Circuit, March Term, 1910.

No. 37.

MORRISDALE COAL COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before Buffington and Lanning, Circuit Judges, and Bradford, District Judge.

LANNING, *Circuit Judge:*

This action was dismissed by the circuit court for want of jurisdiction. See 176 Fed. 748. It is an action by the plaintiff, Morrisdale Coal Company, to recover from the defendant, Pennsylvania Railroad Company, damages for the alleged violation of section 3 of the act to regulate commerce, approved February 4, 1887, which declares that "it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any par-
165 ticular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The claim of the plaintiff is that the distribution of coal cars amongst the mines of the Clearfield Coal Region of Pennsylvania, in which the plaintiff's mines are located, and the mines in other coal regions, during the years 1900 to 1905 inclusive, was unduly and unreasonably prejudicial and disadvantageous to the plaintiff. The rule under which that distribution was made was abolished by the railroad company on January 1, 1906, when it adopted and put into operation a new rule of distribution. The action in this case was commenced March 3, 1908, more than two years after the rule of distribution now complained of had been abolished. The judgment of the circuit court was based on its understanding of the interpretation of the act to regulate commerce by the Supreme Court in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, and two or three other cases to be later referred to.

The Abilene case was one in which an action was instituted to recover from the railroad company a sum of money equal to what the Abilene Cotton Oil Company declared was the excess over a reasonable charge which it had been compelled to pay to the railroad company for the transportation of cotton seed. It was conceded, in the opinion of the Supreme Court, that at common law such an action would lie, and that the act to regulate commerce should not

be construed as taking away the right unless such construc
166 tion was imperatively required. But taking into consider
tion the remedial provisions of the act, and the destructio
of them which would result from allowing a court and jury, witho
reference to prior action by the Interstate Commerce Commissio
to find an established rate to be unreasonable, it was decided that,
the power existed in both courts and the Commission to hear ori
inally complaints in cases of alleged preferences in rates, an esta
lished schedule of rates might be found reasonable by the Commi
sion and unreasonable by a court, and thus give rise to a confli
which would render the enforcement of the act impossible. R
ferring to action 9 of the act, which provides that any person clai
ing to be damaged by any common carrier subject to the provisio
of the act may either make complaint to the Commission or brin
suit for the recovery of damages in any district or circuit court
the United States of competent jurisdiction, but that he shall n
have the right to pursue both of such remedies, the court said "w
think that it inevitably follows from the context of the act that th
independent right of an individual originally to maintain actio
in courts to obtain pecuniary redress for violations of the act co
ferred by the ninth section must be confined to redress of suc
wrongs as can, consistently with the context of the act, be redresse
by courts without previous action of the Commission, and, therefo
does not imply the power in a court to primarily hear complain
concerning wrongs of the character of the one here complained of.

The conclusion of the court was that a shipper seekin
167 reparation predicated upon the unreasonableness of an esta
lished rate must, under the act to regulate commerc
primarily invoke redress through the Interstate Commerce Commi
sion, which body alone, it was declared, is vested with power ori
inally to entertain proceedings for the alteration of an establishe
schedule.

The plaintiff in the present case has primarily invoked redre
through the circuit court and not through the Interstate Commerc
Commission. But, since the opinion in the Abilene case dealt wit
the rule of procedure for the recovery of damages in a case of allege
unreasonable rates, while in the present case we deal with th
rule of procedure for redress in a case of an alleged unreasonabl
regulation for the distribution of cars not in operation whe
the action was commenced, the question arises whether the co
struction of the statute which excluded the Abilene case fro
the class of cases that may be primarily instituted in a court als
excludes such a case as the one now in hand. To answer the que
tion, we must determine first, whether a distinction exists betwee
the Abilene case and the present case by reason of the fact that th
action in the present case was not commenced until after the rul
complained of had been abolished, and, if not, then, second, whethe
a distinction exists by reason of the fact that in the Abilene cas
the rule complained of was one affecting rates while in the presen
case it is one concerning the distribution of cars.

As to whether the doctrine of the Abilene case is inapplicable be

cause the present action was not commenced until after the
168 rule complained of has been abolished, it is contended, as
we understand the plaintiff's argument, that at common law the Morrisdale Coal Company had a right of action against the Pennsylvania Railroad Company for damages sustained by the former company by reason of the enforcement against it of the old rule, and that the effect of the act to regulate commerce was merely to suspend that right while the rule was operative. Consequently, it is argued, the common law right of action was revived on January 1, 1906, when the new rule was substituted for the old one.

For present purposes, we deem it unnecessary to consider what right at common law, if any, the coal company may have had in the absence of the act to regulate commerce. While section 22 of the act has a clause which declares that "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," it was held in the Abilene case that that section could not "in reason be construed as continuing in shippers a common law right the continued existence of which would be absolutely inconsistent with the provisions of the act." What was really done by the Pennsylvania Railroad Company on January 1, 1906, was to change or modify its rule for the distribution of cars. If a common carrier can defeat the power of the Interstate Commerce
Commission to inquire into the reasonableness of its rates or
169 regulations by voluntarily changing or modifying them, frequent changes or modifications would very seriously impair the efficiency of the Commission and the purposes of the act. It is clear that Congress intended by the legislation embodied in the act to regulate commerce, and the amendments thereof passed prior to January 1, 1906, to confer upon the Interstate Commerce Commission very large powers in investigating the accounts and regulations of common carriers subject to the provisions of the act, and in requiring obedience to those provisions. So plenary is the administrative power of the Commission that in the Abilene case it was said that "although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

It does not follow, from what has been said, that the Commission was bound, under the statute as it existed prior to 1906, to investigate every claim for damages against a common carrier founded on a violation of the statute by the enforcement of a rule not in existence when the complaint was made. Section 16 of the act, as amended June 29, 1906, declares that—

170 "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the

cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order; provided, that claims accrued prior to the passage of this act may be presented within one year."

Although previous to 1906 there was in the act no express limitation of time within which a proceeding before the Commission should be commenced, before the amendment as well as after it a claim for damages might have been barred by lapse of time. An order by the Commission to pay damages was but a recommendation. Payment could have been enforced only by an action in some court. As the court would regard the statute of limitations, the Commission would do so. Such, evidently, was the view of the Commission as to claims accrued before the amendments of 1906. Cattle Raisers' Association v. C. B. & Q. R. Co., 10 I. C. C. Rep., 83; Missouri & Kansas Shippers' Association v. A. T. & S. F. Ry. Co., 13 I. C. C. Rep., 411. The object of the limitation above quoted was to shorten the period within which claims for damages might be filed, saving, however, to any claimant whose claim had accrued more than two years before the amendment took effect a year within which to present his claim. "The intent of the proviso (in the amendment) is, in our opinion," said the Commission in Nicola, Stone & Myers Co. v. L. & N. R. R. Co., 14 I. C. C. Rep. 196, 206, "to prevent
171 such a construction of the preceding part of this provision as to cut off claims upon previously accrued causes of action as to which the two years had already run, or so nearly so that it would be impracticable for the claimants to present their claims within such period.'

We conclude, therefore, that if, except for the act to regulate commerce, the Morrisdale Coal Company would have had a common law right of action against the Pennsylvania Railroad Company for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time and the Coal Company given a substituted right of procedure before the Commission, at any time within one year after June 29, 1906, for a determination by the Commission of the question whether the rule complained of was discriminatory, unless, indeed, the Commission has no power, under the act, to determine whether a rule for the distribution of cars is discriminatory.

In considering what power, if any, the Commission has over rules for the distribution of cars, it is to be observed that section 3 of the act declares it to be unlawful for any common carrier to subject any party to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; that section 12 authorizes and requires the Commission to execute and enforce the provision of the act; that section 12 imposes on the Commission the duty of investigating complaints concerning anything done or omitted to be done by any com-
mon carrier subject to the provisions of the act; that section
172 14 requires the Commission to make a report in writing of each of its investigations and to embody therein its decision, order or requirement, and, in case damages are awarded, the find-

ings of fact on which the award is made; that section 15 authorizes and empowers the Commission to investigate alleged unreasonable rate charges and alleged unreasonable or discriminatory regulations or practices and to prescribe what shall be just, fair and reasonable; that section 16 provides that the Commission, where upon a complaint filed under section 13 it has determined that the complainant is entitled to an award of damages, shall make an order "directing the carrier to pay to the complainant the sum to which he — entitled on or before a day named," that if payment shall not be made within the time limit of the order the complainant may commence an action in a circuit court of the United States for the recovery of his damages, and that, on the trial, the order of the Commission "shall be prima facie evidence of the facts therein stated"; and that section 10 of the amendment of March 2, 1889, authorizes circuit and district courts of the United States to issue writs of mandamus against common carriers in certain cases of violation of the act. Unless these provisions are to be restricted by construction, they seem to require the Commission not only to determine what are just and reasonable rate schedules, but, also, what are just and reasonable regulations and practices, and to ascertain and award damages, where they have been sustained, in every case in which it finds that an unjust rate schedule or an unjust regulation or practice has been in operation.

173 In Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481, a case in which the Pitcairn Coal Company applied in the first instance to the United States circuit court for the district of Maryland, after the amendments of 1906 had gone into effect, for a mandamus to compel the Baltimore & Ohio Railroad Company to alter its rule for the distribution of cars, Mr. Justice White, after referring to the Abilene case, said: "The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by section 15, as enacted by the amendment of June 29, 1906, the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason so to do, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action." And, in construing section 23 (section 10 of the amendment of March 2, 1889, concerning the power of courts to issue writs of mandamus) with the other provisions of the act, it was said: "It being demon-

174 strable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had

been previously enacted in 1889. This conclusion being in res
impossible, it must follow that, construing the provisions of sect
23 in the light of and in harmony with the amendments adopted
1906, the remedy afforded by that section, in the cases which it
braces, must be limited either to the performance of duties which
so plain and so independent of previous administrative action of
Commission as not to require a prerequisite exertion of power by t
body, or to compelling the performance of duties which plai
arise from the obligatory force which the statute attaches to ord
of the Commission, rendered within the lawful scope of its authori
until such orders are set aside by the Commission or enjoined by
courts." Accordingly, it was decided that the circuit court did
have original jurisdiction to determine the legality of the rule of
Baltimore & Ohio Railroad Company for the distribution of c
cars, and the petition for a writ of mandamus was ordered to
dismissed.

In Interstate Commerce Commission v. Illinois Central R. R. C
215 U. S., 452, the complaint was also against an alleged d
175 criminatory rule for the distribution of coal cars. There,
plication for redress was originally made to the Commissio
It made an order requiring a change in the rule. Subsequently, t
United States circuit court decreed an injunction against the enfor
ment of certain provisions of the Commission's order. In the s
preme court it was contene*de* that while section 15 of the act,
amended in 1906, confers upon the Commission authority upon co
plaint duly made to declare a rate or practice affecting rates illeg
and to establish a new and reasonable rule or practice affecting su
rates for a term not exceeding two years, it has no relation to co
plaints concerning preferences or discriminations that do not affe
rates. In other words, the contention was that the Commission h
no authority to make an order requiring a change in the rule for t
distribution of cars because such a rule does not affect rates. B
it was declared that such a construction would frustrate the ve
purpose of the act. "The antecedent construction which the Inte
state Commerce Act had necessitated," said the court, referrin
evidently to the Abilene case, "and the remedial character of t
amendments adopted in 1906, all serve to establish the want of mer
in the contention relied upon. In addition, to adopt it would requi
us to hold that congress, in enlarging the powers of the Commissio
over rates, had so drafted the amendment as to cripple an
176 paralyze its power in correcting abuses as to preferences an
discriminations which, as this court has hitherto pointed ou
it was the great and fundamental purpose of congress to further.
Accordingly, the decree for injunction was reversed.

These cases conclusively establish the doctrine that the Interstat
Commerce Commission alone has original jurisdiction to determin
whether an existing rate schedule, or an existing regulation or pra
tice affecting rates, or an existing regulation or practice of any othe
kind affecting matters sought to be regulated by the act, is unju
or unreasonable, or unjustly discriminatory, or unduly preferentia
or prejudicial, and that the courts cannot, by mandamus, injunctio
or otherwise, control or modify any order of the Commission mad

by it in the due performance of its merely administrative functions. Of course, there may be cases involving constitutional or legal rights, in which judicial questions for the determination of the courts may be presented. It is also the established doctrine that where the subject matter of the complaint is an alleged unreasonable or prejudicial rate-charge, the Commission has the power, after determining that the charge was excessive, to award damages to the complainant. In such case, the award would probably be a mere matter of calculation and would be a sum equal to the difference between the charge found to be reasonable and the charge actually made by the carrier. In a case where the alleged discriminatory rule has relation to the distribution of coal cars, it is obvious that, if the Commission sustains the complaint and prescribes what shall thereafter be a
177 reasonable rule of distribution, an award of damages to the complainant for injuries sustained under the operation of the discriminatory rule cannot be a mere matter of calculation. It has therefore been held, by a majority of the Commission, in Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co., decided March 7, 1910, that it has no authority or power to assess and determine the measure of damages in such a case as the one now before us. The view of the majority of the Commission was that the only damages it may assess are rate damages, or damages that can be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought to be charged. The same view had been previously expressed by a majority of the Commission in Joynes v. Pennsylvania R. R. Co., 17 I. C. C., 361. "As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices," said the majority through Mr. Commissioner Harlan, "and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the Commission is divided, as in the case to which we have just alluded (the Joynes case). The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts." Inasmuch, however, as the case now before this court had been decided by the circuit court before the Hillsdale Coal & Coke Company's case was decided by the Commission, it
178 concluded to hear argument on the question of damages to the end that, if the Commission should award damages, the question of its power so to do might ultimately come before the courts for their consideration.

As already suggested, the letter of the statute seems to confer upon the Commission the power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law, its findings and order are but prima facie evidence of the damages sustained. We do not find it necessary, however, to decide at present the question on which the members of the Commission are divided. If judicial action shall be taken in the Hillsdale Coal & Coke Company's case, the court whose jurisdiction will be invoked will doubtless be the court from which our present case has come. We have not had the benefit of any argument on the question. It is not even suggested

in the record or briefs of this case. For the present, it is suffici
for us to say that, in our opinion, a party claiming to be injured
a discriminatory rule for the distribution of coal cars, cannot ma
tain in a court of law an action for the recovery of damages bef
the Interstate Commerce Commission has investigated the case a
determined by its report that the rule is or was discriminatory. T
determination of that question, at least, involves only the p
formance of administrative functions which, under the a
179 are to be performed by the Commission and not by any cou
Whether, after the Commission has found such a rule to
discriminatory, it is its duty to proceed to assess the damages, if an
which the complaining party has sustained, or whether they are
be recovered by an action in some court without any prelimina
assessment by the Commission, is a question which, since it has n
been argued before us and since its decision is not necessary to th
disposition of the case we now have in hand, we should not at prese
decide.

For the reasons stated, the judgment of the circuit court will b
affirmed, with costs.

Supplemental Opinion.

Before Buffington and Lanning, Circuit Judges, and Cross, Distri
Judge.

LANNING, *Circuit Judge:*

After the foregoing opinion had been prepared, but before it wa
filed, the defendant in error presented its petition for the dismissa
of the writ of error on the ground that, under the provisions of sec
tions 5 and 6 of the act establishing circuit courts of appeals, we hav
no appellate jurisdiction of this case. The provisions referred t
are—

"SECTION 5. That appeals or writs of error may be taken from th
district courts or from the existing circuit courts direct to the
180 Supreme Court in the following cases: (1) In any case in
which the jurisdiction of the court is in issue; in such case
the question of jurisdiction alone shall be certified to the Supreme
Court from the court below for decision. * * *

SECTION 6. That the circuit court of appeals established by this
act shall exercise appellate jurisdiction to review by appeal or by
writ of error final decisions in the district courts and the existing
circuit courts in all cases other than those provided for in the pre-
ceding section of this act, unless otherwise provided by law."

To the plaintiff's statement or declaration in the court below the
defendant filed the pleas of the general issue and the statute of limi-
tations. The case went to trial on the merits before the court and
a jury and a special verdict was taken in the following form:

"We find as a fact that the amount of the plaintiff's claim is
correct and is contained in its exhibit 2, and is

Principal	$51,640.60
Int.	15,515.49
Total	**$67,156.09**

Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.

If the court shall be of opinion that the questions of law
181 involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

Concerning the requests to charge, the Court said: "The points of the plaintiff and defendant respectively are not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant." In none of the defendant's points was the question of the jurisdiction of the circuit court raised. Sometime after the rendition of the verdict, and before judgment had been entered, the defendant moved that the circuit court dismiss the action for want of jurisdiction. That motion having been argued, and the circuit court having concluded that it should be granted, final judgment was entered "in favor of defendant and against the plaintiff in accordance with the opinion of the court." This judgment, which we will assume is one dismissing the action for want of jurisdiction, having been brought to this court by the writ of error which we are now asked to dismiss, the case was argued here on the assignments of error filed by the plaintiff without a suggestion from the defendant that we had no appellate jurisdiction of the case.

We think the following rules may be deduced from the adjudicated cases.

182 1. If a case in a district or circuit court is dismissed by final judgment or decree, either for want of jurisdiction of the parties or for want of power as a federal court to take jurisdiction of the subject matter, without the decision of any other question, so that the only question presented by the record is such question of jurisdiction, the judgment or decree can be reviewed by the Supreme Court only, on appeal or writ of error, with a certificate from the lower court of the question of jurisdiction.

In support of the rule as thus stated we refer to Davis & Rankin Bldg. & Man'f'g Co. v. Barber, 60 Fed., 465, where defendants demurred to plaintiff's declaration on the ground that the liability of the defendants upon the contract sued on was several and not joint, and that, being so construed, the claim against each defendant was less than the minimum sum necessary to give the court jurisdiction of the subject matter of the action, and where, the court sustaining that view and dismissing the action for want of jurisdiction, the circuit court of appeals of the seventh circuit, concluding that the case should have been taken directly to the Supreme Court, dismissed its writ of error for want of appellate jurisdiction; Cabot v. McMaster, 65 Fed. 533, where the action went to trial before the circuit court without a jury and that court, without deciding the merits of the

controversy, dismissed the action because the amount in con-
183 troversy was less than the minimum sum necessary to give jurisdiction to the court, and where the circuit court of appeals of the seventh circuit dismissed the writ of error sued out of that court for want of appellate jurisdiction; Chappel v. United States, 160 U. S., 499, where the writ of error from the Supreme Court to a district court was general and not limited to any definite question of jurisdiction and brought up the whole case, including a question concerning the constitutionality of a law of the United States, and where the Supreme Court, while retaining appellate jurisdiction because under the provision of subdivision 5 of section 5 of the act establishing circuit courts of appeal that court has such jurisdiction in any case in which the constitutionality of a law of the United States is drawn in question, said that, in order to bring a case within subdivision 1 of section 5 of the act, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to the Supreme Court; Shepard v. Adams, 168 U. S., 618, where defendant moved to set aside the service of a summons upon him, and where, the district court overruling his motion and entering final judgment against him because he chose to stand on his motion and not to plead, the Supreme Court refused to dismiss the writ of error, which had issued from it directly to the district court, and disposed of the case on the error assigned: Evans-Snider-Buel Co. v.
184 M'Caskill, 101 Fed., 658, where a plea to the jurisdiction of the circuit court was filed setting up that the defendant was not a resident of the district in which he was sued, the plea sustained and the action dismissed, and where the writ of error from the circuit court of appeals of the eighth circuit was dismissed for want of appellate jurisdiction; Excelsior Wooden-Pipe Co. v. Pacific Bridge Co., 109 Fed., 497, where, after issue had been joined on a bill to restrain infringement of certain letters patent, and after the defendants had applied to the circuit court for an order extending the time for the completion of their proofs and the complainant had moved *fro* a decree on the pleadings and papers filed in the case, the court called for argument on the question of its jurisdiction of the controversy and subsequenty, without deciding either of the motions previously made, dismissed the case for want of jurisdiction, on the ground that the case was one arising on contract and not under the patent laws of the United States and was not a case in which there was a diversity of citizenship, and where the circuit court of appeals of the ninth circuit dismissed the appeal to that court because error could not be assigned on the circuit court's refusal to extend the defendants' time for completing their proofs, nor on its refusal to enter a decree upon the pleadings, and because upon the record the question of the jurisdiction of the circuit court only was in issue—a decision concurred in by the Supreme Court which subsequently, in 185 U. S., 282, entertained an appeal and reversed the circuit
185 court. Hays v. Richardson, 121 Fed., 536, where the dismissal was on the ground that the attachment of the defendant's property, by which the action was initiated, was illegal, and

where, no other question being tried or decided in the court below, the writ of error from the circuit court of appeals of the ninth circuit was dismissed for want of appellate jurisdiction; The Steamship Jefferson, 215 U. S., 130, where a district court dismissed a libel for salvage services on the ground that there can be no lien for services in extinguishing a fire on a vessel while in a dry dock and, therefore, because the district court, as a court of admiralty, had no jurisdiction of the case, and where the Supreme Court, on an appeal taken directly to it, held that, as the question of the jurisdiction of the district court as a federal court was the only question decided by it, the direct appeal to the Supreme Court was proper; The Alliance, 70 Fed. 273, where a district court dismissed a libel in admiralty for want of jurisdiction without the decision of any other question, and where the circuit court of appeals of the ninth circuit dismissed the appeal taken to that court on the ground that it should have been taken to the Supreme Court; St. Louis Cotton Compress Co. v. Americon Cotton Co., 125 Fed., 196, where the circuit court dismissed the action because of invalid service of a summons upon the defendant and consequent want of jurisdiction of the defendant, and where the circuit court of appeals of the eighth circuit dis-
186 missed the writ of error from that court on the ground that the Supreme Court had exclusive appellate jurisdiction of the case; Board of Trade v. Hammond Elevator Co., 198 U. S., 424, where the circuit court dismissed a bill because of want of jurisdiction of the defendant by reason of invalid service of the subpœna ad respondendum, and where the Supreme Court, on an appeal direct to it, retained appellate jurisdiction; Davis v. C. C. C. & St. L. Ry., 217 U. S., 157, where the circuit court dismissed the action on defendant's objection that the attachment of its property was illegal and that the court had therefore not acquired jurisdiction of the person or the property of the defendant, and where the Supreme Court refused to dismiss the writ of error which took the cause, with a certificate of the question of jurisdiction only, directly to that court, it saying that it concurred with the views of the circuit court of appeals of the eighth circuit when, in dismissing the writ of error from that court in the same case, it declared that the case was not distinguishable, in respect of its essential characteristics, from one where there has been an illegal service of summons upon a defendant; and Lehigh Valley Railroad Company v. Cornell Steamboat Company, Claimant of Steam Tug Ira M. Hedges, decided by the Supreme Court on November 7, 1910, where a libel in admiralty was brought to enforce contribution for the damages resulting from a col-
187 lision of vessels which the libellant, by reason of a common law judgment against it, had been compelled to pay, where exceptions to the libel were filed and the libel dismissed on the ground that the district court, as a court of admiralty, had no jurisdiction to enforce such a contribution, where an appeal was taken directly to the Supreme Court, and where that court asserted its jurisdiction of the appeal.

2. If a case in a district or circuit court goes to trial or hearing on a question of jurisdiction and on the merits, and the question of

jurisdiction is one concerning either the jurisdiction of the parties or the power of the court as a federal court to take jurisdiction of the subject matter, the party dissatisfied with the final judgment or decree, whether he be plaintiff or defendant, may waive all errors on the merits and take the case directly to the Supreme Court, on appeal or error, with a certificate from the lower court of the question of jurisdiction; or, he may assign errors on the merits and on the question of jurisdiction, and take the whole case, on appeal or error, to the proper circuit court of appeals. In the latter proceeding, the circuit court of appeals may certify the question of jurisdiction to the Supreme Court and defer decision upon the other questions until the answer of the Supreme Court shall have been received.

In support of the rule as thus stated we refer to McLish v. Roff, 141 U. S., 662, where the defendant filed a demurrer to the jurisdiction of the court below, on the ground that, as it appeared by
188 the complaint that the plaintiff and defendant were both citizens of the Chickasaw tribe of Indians, the court had no jurisdiction of the parties, and also on the ground that the courts of that tribe had exclusive jurisdiction, where the court overruled the demurrer and required the defendant to proceed with the trial of the cause upon the merits, and where the Supreme Court, while dismissing the writ of error sued out of that court directly to the trial court on the ground that it was sued out before the entry of final judgment, said, however, that "when that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case"; United States v. John, 155 U. S., 109, where the board of general appraisers imposed a *guaging* charge on imported molasses, where the circuit court reversed the board on the ground that such charge had been abolished, where on a writ of error from the circuit court of appeals to the circuit court the United States assigned for error that the decisions of the board of general appraisers was final and conclusive and that the circuit court had no jurisdiction, and also assigned errors on the merits, and where the Supreme Court, after answering in the affirmative the question whether the circuit court had jurisdiction to hear and determine the points of
189 law and fact involved in the decision of the board of general appraisers, which had been certified to the Supreme Court by the circuit court of appeals, left the latter court to exercise appellate jurisdiction on the merits of the case; Crabtree v. Madden, 54 Fed., 426, where the complaint was demurred to because it did not state a cause of action, because the court had no jurisdiction of the parties, and because the plaintiff had no legal capacity to sue, where the demurrer was sustained and the action dismissed, where the writ of error brought up to the circuit court of appeals the whole case, including the question whether the complaint stated a cause of action, where, on a motion to dismiss the writ of error on the ground that the only question presented by the record was the question of jurisdiction of the court below and that the jurisdiction of the Supreme Court to review that question was exclusive, the circuit court of ap-

peals said that the writ of error brought up the whole case and that, if it should be of the opinion that the court below had jurisdiction of the subject matter and the parties, there would remain for its determination the question whether the complaint stated facts sufficient to constitute a cause of action, and where, accordingly, it refused to dismiss the writ but proceeded to consider the case and affirmed the lower court because that court had no jurisdiction; and

Wirgman v. Persons, 126 Fed., 454, where the decree in
190 favor of the complainants was appealed by the defendants and errors were assigned on the question of jurisdiction and on the merits, and where the circuit court of appeals of the fourth circuit asserted its appellate jurisdiction, notwithstanding counsel on both sides stipulated, before the argument in the circuit court of appeals was commenced, to confine themselves to the question of jurisdiction.

3. If a case in a district or circuit court is dismissed by final judgment or decree for want of jurisdiction, either after a hearing on a question of jurisdiction only or after a hearing or a trial on a question of jurisdiction and the merits, and the question of jurisdiction is not one concerning jurisdiction of the parties or concerning the power of the court as a federal court to take jurisdiction of the subject matter of the action, but is a question of jurisdiction relating to the general authority of the court as a judicial tribunal, the party dissatisfied with the judgment or decree, whether he be plaintiff or defendant, may have the judgment or decree reviewed, on appeal or error, by the proper circuit court of appeals only.

In support of this rule we refer to Smith v. McKay, 161 U. S. 355, where the defendants filed an answer to the complainant's bill averring, amongst other things, that the complainant had a plain, adequate and complete remedy at law, which objection was overruled, where the case was heard on pleadings and proofs and
191 final decree rendered against the defendants, where appeal was taken directly to the Supreme Court and error assigned on the refusal of the circuit court to dismiss the suit for want of jurisdiction, and where the Supreme Court dismissed the appeal on the ground that the objection was not the want of power in the circuit court to entertain the suit, but the want of equity in the complainant's bill; Blythe v. Hinckley, 173 U. S., 501, where one of the grounds for dismissing the bill of the complainant was that the complainant's remedy was at law and not in equity, and therefore not a decision that the circuit court had no jurisdiction as a court of the United States, and where the Supreme Court for that reason, and for another which did not involve the jurisdiction of the circuit court as a federal court, dismissed the appeal that had been taken directly to the Supreme Court; Louisville Trust Co., v. Knott, 191, U. S., 225, where a circuit court refused to order its receiver to surrender his possession of certain property to a receiver appointed by a state court, the single question being which of the two courts had acquired prior jurisdiction, and where the Supreme Court dismissed the appeal taken to that court on the ground that the case presented no question involving the jurisdiction of the circuit court as a federal tribunal, but simply its general authority as a judicial

tribunal to proceed in harmony with established rules of
192 practice governing courts of concurrent jurisdiction as between each other; Bache v. Hunt, 193 U. S., 523, where, on an intervening petition filed by Hunt in a foreclosure suit in which Bache was a defendant, Bache filed a plea to the jurisdiction of the court over the subject matter of the petition and of his person, where the circuit court overruled the plea and rendered a decree against Bache, and where the Supreme Court dismissed the appeal taken directly to that court, saying that the jurisdiction of the circuit court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States, and that the established rules of practice as to bringing in parties to ancillary or pro interesse suo proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved and United States v. Larkin, 208 U. S., 333, where a district court dismissed the information filed for the forfeiture of certain jewels on Larkin's plea to the jurisdiction of the court that the jewels had been wrongfully taken by an agent of the Government into the district where the information was filed, and where the Supreme Court dismissed the writ of error which had issued out of that court directly to the district court on the ground that the question involved was not the jurisdiction of the United States courts as such, but whether the district court in which the information was filed, or the district court in which the jewels were first found, had jurisdiction.

The first of these rules applies to a case where the lower
193 court decides nothing but a question of jurisdiction. That question may be one concerning jurisdiction of the parties (as where no valid service of a summons upon a defendant is made, or where the initial step in an action is an illegal attachment of the defendant's property), or it may be one concerning the power of the lower court, as a federal court, to take jurisdiction of the subject matter of the action (as where there is no proper diversity of citizenship of the parties, or where the matter in dispute does not exceed in value the sum of two thousand dollars, or where there is a question as to whether a claim may be enforced in a court of admiralty).

The second rule applies to a case where there has been a decision in the lower court on the merits and also on a question concerning that court's jurisdiction of the parties, or concerning its power to take jurisdiction of the subject matter of the action.

The third rule applies to a case where the lower court has decided a question of jurisdiction, either with or without deciding the merits, such questions of jurisdiction being one concerning its general authority as a judicial tribunal, and not a question concerning jurisdiction of parties or of subject matter; as, for example, whether a remedy should be sought at law or in equity, or which of two courts having concurrent jurisdiction first acquired jurisdiction, or which of two federal courts of equal rank but in different localities has jurisdiction.

The case now in hand went to trial on the merits. The jury
passed upon the merits by rendering a special verdict award-
194 ing damages for the plaintiff against the defendant, if the court should be of the opinion that the law was with the

plaintiff, and, if it should be of the opinion that the law was with the defendant, then giving its verdict to the defendant. The circuit court concluded that the Interstate Commerce Commission had original jurisdiction in the case, and therefore, it refused to enter judgment for the plaintiff on the special verdict and entered judgment dismissing the action for want of jurisdiction. The question of jurisdiction was one concerning the jurisdiction of the circuit court as a federal court. Errors were assigned on the question of jurisdiction and also on the merits. The errors assigned were that the circuit court erred (1) in dismissing the action for want of jurisdiction; (2) in dismissing the action for want of jurisdiction and entering judgment in favor of defendant; (3) in not entering judgment in favor of the plaintiff for the sum of $67,156.09; (4) in not affirming the plaintiff's first point by charging the jury as to the duty of the Pennsylvania Railroad Company concerning the distribution of cars; and (5) in not affirming the plaintiff's second point by charging the jury as to the method of ascertaining the damages sustained by the plaintiff. In the argument in this court on the errors assigned counsel for the plaintiff contended that the circuit court had jurisdiction of the case, that the defendant's rule for the distribution of cars illegally discriminated against the plaintiff, and that the damages sustained by the plaintiff were the full amount
195 named in the special verdict. The defendant, on the other hand, contended that the circuit court did not have jurisdiction of the case, that, if it did, still the plaintiff offered no evidence from which a jury could find that it did not receive all the cars it would have been entitled to under such a rule as that for which it contended, that the defendant's rule for the distribution of cars was not illegally discriminatory, and that the method by which the damages were estimated by the jury was erroneous. Both parties argued at length both the question of jurisdiction and the questions concerning the merits. This they properly did because those questions were presented by the assignments of error. Had we concluded that the circuit court erred in dismissing the action for want of jurisdiction, it would have been our duty not only to reverse the judgment of the circuit court but to decide whether the plaintiff was entitled to judgment on the special verdict. The case comes therefore within the provisions of the second rule above given. The defendant had the right to assign errors on the merits and on the question of jurisdiction and to bring the whole case to this court. This it did. Consequently, the case is properly here and the motion to dismiss the writ of error must be denied.

(Endorsed: 1352. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Opinion. Lanning, C. J. Received & Filed Nov. 17, 1910. Saunders Lewis, Jr., Clerk.)

196 March Term, 1910.

No. 37.

MORRISDALE COAL CO.
vs.
PENNSYLVANIA RAILROAD CO.

BUFFINGTON, *J.*, dissenting:

As this court's own jurisdiction over this case is here involved, and I firmly believe it has no jurisdiction, I deem it my duty to record my dissent. In the court below the Morrisdale Coal Co. brought suit against the Pennsylvania Railroad. The railroad was an interstate carrier and the plaintiff coal company required cars for interstate coal shipments. The Pennsylvania Railroad furnished coal cars to different coal regions, over its system, one of which was the Clearfield region in which plaintiff's mines were located. Plaintiff alleges the railroad "failed and refused to assign to the Clearfield coal region for use therein the fair proportion of the entire number of coal cars of said railroad company to which said region was entitled." That raised the question of the regulation of car division between different coal regions of the Pennsylvania Railroad system. The daily production capacity of the Clearfield region was rated at eighteen to nineteen thousand tons of coal and the statement alleged the railroad failed to furnish on demand "the plaintiff's due proportion or daily allotment of cars which were or should have
197 been assigned to shippers in the said Clearfield coal region for the transportation of coal." The plaintiff therefore alleged that "by the failure on the part of the defendant to give the plaintiff its proper allotment of cars during the period aforesaid, undue and unreasonable preferences and advantages were given to the other mines and collier-s in the said Clearfield coal region and to shippers in other coal regions, over the plaintiff, in that said mines and collieres were thereby accommodated with car supply and facilities for the shipment of coal greater than that which should be proberly allotted to them when compared with the facilities allotted to the plaintiff. The case proceeded to trial and on November 17, 1909, a special verdict for the plaintiff was found, subject to the court's determination of the law. On November 29, the plaintiff moved for entry of judgment on this verdict. Pending this motion, which was never disposed of, the defendant moved the court on January 31, 1910, to dismiss the action for want of jurisdiction, its motion being as follows: "And now, this thirty-first day of January, 1910, the defendant moves the court to dismiss this action for want of jurisdiction to entertain the same." This motion to dismiss the court below, in an opinion reported at 176 Fed. Rep. 748, and in which the question of jurisdiction alone was discussed, held the suit involved the proper car regulation and car distribution of the railroad; that this
was an administrative question for the Interstate Commerce
198 Commission and the circuit court was without jurisdiction. Its opinion, which as we have said, neither discussed nor dis-

posed of the merits of the case or the plaintiff's motion for judgment, concluded with the statement: "The defendant's motion to dismiss the suit for want of jurisdiction must be granted." Thereafter the defendant filed a præcipe as follows: "Enter judgment in the above case in favor of the defendant and against the plaintiff in accordance with the opinion of the court filed," and in pursuance thereof judgment was entered as follows: "And now, this Tenth day of February, 1910, in accordance with præcipe filed judgment is hereby entered in the above entitled case in favor of the defendant and against the plaintiff in accordance with the opinion of the court." On motion of plaintiff's counsel the court allowed the plaintiff the only exception asked for, viz.: "Exception to the action of the court in granting defendant's motion to dismiss this suit for want of jurisdiction."

It will thus be seen that the court heard, decided and decreed no question save that of jurisdiction, and was in a position to certify that the only question in the case was one of jurisdiction. Under such facts to what court did a writ lie to review such jurisdictional judgment. If plain words can point out plain paths, section 5 of the Act of March 3, 1891, makes the supreme court in such case the sole reviewing tribunal, for it provides "That appeals or writs of error may be taken from the district court or from the existing circuit courts direct to the supreme court in the following cases;
199 (1) In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Now the case in hand falls literally within this provision; the jurisdiction of the court below was in issue; it was challenged by a motion to dismiss for want of jurisdiction; that issue was decided; a judgment was entered dismissing the case for want of jurisdiction and exception was taken to the judgment dismissing for want of jurisdiction. United States vs. Jahn, 155 U. S. 112, was a case where, as here, jurisdiction was in issue, and the decision was against jurisdiction. The case went direct to the supreme court and was said by that court in speaking of its jurisdiction to review under section 5; "If in such a case a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by this court upon a certificate of the circuit court, while if the jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the circuit court of appeals would undoubtedly have jurisdiction to review the case upon the merits."

The extract quoted above covers exactly the case in hand. The court below entered judgment for the want of jurisdiction, and therefore the writ *law* direct to the Supreme Court. Had the circuit court sustained jurisdiction and passed on the merits, the defendant would have had alternative remedies, but that state of facts
200 never arose, hence the writ lay to the supreme court and that court alone. The authority of United States vs. Jahn has not been question- or qualified in any subsequent case. It is true, as stated by Judge Sanborn in St. Louis Co. vs. American Co., 125 Fed.

Rep. 199, there are expressions in some later opinions of the supreme court that the jurisdiction by section 5, supra, is "the jurisdiction of the Circuit and District Courts as such (Mexican Central Ry. Co. vs Echman, 187 U. S. 432, 23 Sup. Ct. 212), and that 'appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue,—that is their jurisdiction as federal courts—the question alone of jurisdiction being certified to this court' (Blythe v. Hinckley, 173 U. S. 501," but as he well says "* * * These statements have never been crystallized into a settled proposition of law, and they have never formed the basis of any decision. * * * That section does not limit the question of which it treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts. It is broad and general in its terms. It contains no exception, and, as the Congress made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to enact one. * * *

201 Where the complainants failed in the circuit court and the supreme court refused to review their failure, they failed, not for want of jurisdiction in the trial court, but for want of equity, for want of facts constituting causes of action, for want of merits in their cases. * * * Our conclusion is that the supreme court has jurisdiction under section 5 of the act creating the circuit courts of appeals to review by writs of error or appeals taken directly to that court from the United States circuit court every question which involves the jurisdiction of the latter court, whether that question is peculiar to the federal courts as such or common to all courts * * * The result is that this writ of error was sued out to review a judgment of a circuit court which sustained an objection to its jurisdiction and dismissed the action on that ground, that the supreme court had jurisdiction to review that judgment by writ of error direct to the circuit court, and therefore this court has no such jurisdiction." This decision was cited and followed in the eighth circuit and a writ of error dismissed in Davis vs. Cleveland Co., 156 Fed. Rep. 774, the court saying the supreme court alone had power to review the case, the latter case was then taken to the supreme court, which court refused to dismiss the writ and decided the case as reported in 217 U. S. 172. In its opinion that court approved the decision of the lower court, saying: "For these propositions the court cited Board of Trade vs. Hammond Elevator Co., 198 U. S. 428; United States vs. Jahn, 155 U. S. 109; St. Louis Cotton Compress Co. vs. American Cotton Co., 125 Fed. Rep. 195; and, as we

202 have seen dismissed the case on the ground that this court alone had the power to review the decision of the circuit court. We concur in the views of the circuit court of appeals, for which also may be cited Kendall vs. American Automatic Loom Co., 198 U. S. 477." In view therefore of the supreme court exercising jurisdiction in the Davis and Kendall cases which involved questions common to all courts, and of its citing in support of its action St. Louis Co. vs. American Co., we are warranted in regarding the holding in the latter case that section 5 "does not limit the questions of which it

treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts," as a construction approved by the supreme court.

In the light of these decisions it is clear the supreme court and that court alone could review the judgment in this case, and that the motion in the circuit court of appeals to dismiss for want of jurisdiction should prevail. Its refusal to dismiss is justified by the majority opinion on the ground that the plaintiff brought the case here for review on the merits as well as the jurisdictional question. The answer to that contention is simply that the case is not before this court on the merits, and this for the simple reason that the court below did not pass on the merits and there is therefore nothing to review but its judgment against the plaintiff for want of
203 jurisdiction. The error of the assumption that the case is before this court for review of the merits is shown by the fact that this court does not dispose of the merits or discuss them in its opinion, but affirms the judgment of the court below and holds it rightly decided the case on the question of want of jurisdiction. It seems to me the plain duty of the court of appeals to dismiss this case for want of jurisdiction, and because it has assumed a jurisdiction the law vests in the supreme court alone, I am constrained to record this my dissent.

(Endorsed: 1352. Dissenting Opinion. Received & Filed Nov. 17, 1910. Saunders Lewis, Jr., Clerk.)

204 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1352 (List No. 37).

MORRISDALE COAL COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

W. M. LANNING,
Circuit Judge.

(Endorsed: 1352. Order Affirming Judgment. Received & Filed Dec. 20, 1910. Saunders Lewis, Jr., Clerk.)

205 In the Circuit Court of Appeals for the Third Circuit, Mar
Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

This cause, being heard upon the record and argument of couns
both upon the merits and upon the jurisdiction of the Circuit Cou
to entertain the action, and the record presenting for necessary co
sideration the proper construction of the Act to Regulate Commer
and the claim of jurisdiction in the Circuit Court not resting sole
upon diversity of citizenship of the parties, and this Court being
opinion that the sound construction of the different provisions of t
Act to Regulate Commerce as amended and now in force necessari
forbid the exercise of jurisdiction in this case by the Circuit Cou
it is adjudged and ordered that the judgment of the Circuit Cou
dismissing the case, be affirmed and that the defendant recover
the plaintiff its costs in this behalf expended.

W. M. LANNING,
Circuit Judge.

(Endorsed: 1352. Judgment affirming Judgment of Court b
low. Received & Filed Jan. 10, 1911, Saunders Lewis, Jr., Clerk.)

206 In the United States Circuit Court of Appeals for the Thi
Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

To the honorable the judges of the said court:

Your petitioner, Morrisdale Coal Company, appellant in the abo
entitled cause, conceiving itself aggrieved by the final decree of th
Court rendered on the 10th day of January, 1911, in favor of app
lees in the above entitled cause, does hereby appeal from said decr
to the Supreme Court of the United States for the reasons specifi
in the assignments of error, which is filed herewith.

Wherefore your petitioner prays for an order that said appeal m
be allowed and that a transcript of the record, proceedings and pape
upon which said decree was made, duly authenticated, may be se
to the Supreme Court of the United States.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Solicitors for Petitioner.

207 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

The above appellant having prayed an appeal from the decree rendered by this Court in the above entitled cause on the 10th day of January, 1911, to the Supreme Court of the United States, and said appellant having filed with the Clerk of this Court its petition for appeal, together with the assignments of errors, and an appeal bond, which bond has been duly approved by the Court:

It is ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

The foregoing is hereby approved for entry this eleventh day of January, 1911.

W. M. LANNING,
Circuit Judge.

208 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal Bond.

Know all men by these presents, That Morrisdale Coal Company, as principal, and Fidelity & Deposit Company of Maryland as surety, are held and firmly bound unto the said Pennsylvania Railroad Company, in the sum of Five hundred dollars ($500.00) to be paid to the said Pennsylvania Railroad Company, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals this 11th day of January, in the year of our Lord, one thousand nine hundred and eleven (1911).

Whereas the above named Morrisdale Coal Company has prosecuted an appeal to the Supreme Court of the United States to
209 reverse the decree rendered in the above entitled cause by the United States Circuit Court of Appeals for the Third Circuit, on the 10th day of January, 1911;

Now therefore, the condition of this obligation is such, That the above named Morrisdale Coal Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their said appeal, then this obligation shall be void otherwise the same shall remain of full force and virtue.

In witness whereof the above named appellant, as principal, and Fidelity & Deposit Company of Maryland as surety, have hereunto set their hands and seals this 11th day of January, 1911, the said principals acting herein by Frank H. Wigton, President, their duly authorized solicitor and attorney.

THE MORRISDALE COAL CO.
FRANK H. WIGTON, *Pres.*
FIDELITY & DEPOSIT CO. OF MD.
HERMAN HOOPES,
[SEAL.] *Resident Vice Pres't.*

Attest:
F. E. TOWNSEND,
Resident Secretary.

Bond approved and accepted, this eleventh day of January, 1911

W. M. LANNING, *Judge.*

210 UNITED STATES OF AMERICA, *ss:*

To the Pennsylvania Railroad Company:

You are hereby cited and admonished to be and appear at the Court Room of the United States Supreme Court at Washington D. C., on the — day of —— 1911, pursuant to an appeal allowed and granted by the United States Circuit Court of Appeals for the Third Circuit, in the cause of Morrisdale Coal Company, as appellant and Pennsylvania Railroad Company, as appellee, to show cause, if any there be, why the decree of the United States Circuit Court of Appeals for the Third Circuit, rendered on the 10th day of January 1911, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 11th day of January, 1911.

W. M. LANNING, *Judge.*

We hereby accept service of the above citation, this 11th day of January, 1911.

JOHN G. JOHNSON,
Att'y for the Pennsylvania Railroad Company,
Per B. O. FRICK.

211 In the Supreme Court of the United States, — Term, 191–.

No. —.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Assignments of Error.

And now, on this 11th day of January, 1911, comes the appellant in the above entitled cause, Morrisdale Coal Company, by William A. Glasgow, Jr., and Chester N. Farr, Jr., its solicitors, and says that in the decree rendered by the United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause, on the tenth day of January, 1911, and in the record and proceedings in said cause in said Court, there is manifest error as set forth in this, its petition for appeal.

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, sustaining the motion of the defendant to dismiss this cause for want of jurisdiction.

212 II.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the Circuit Court had jurisdiction of this cause.

III.

That the said Circuit Court of Appeals erred in failing to direct the Circuit Court to enter judgment in favor of the plaintiff in the sum of Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09).

IV.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and in failing to direct that in periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Railroad Company could not furnish all the cars required for the shipment of coal by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was entitled each day to have assigned to

its use the number of cars which its percentage of all such available cars would award to it in accordance with the system of distribution in effect.

213 V.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and the action of the Circuit Court, in failing to direct that if the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant. The damages should be estimated as follows: The jury should first determine the difference in tonnage between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region. This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton
214 at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts for shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled.

Wherefore the above named appellant in the above entitled cause, viz: Morrisdale Coal Company, prays that the said decree of said United States Circuit Court of Appeals for the Third Circuit, rendered in the above entitled cause on the 10th day of January, 1911, be reversed; and that this Honorable Court will enter on the record such order and decree as may be meet and proper in the premises.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Morrisdale Coal Company.

(Endorsed: In the U. S. C. C. A. 3rd Circuit. Morrisdale Coal Company, Appellant, vs. Pennsylvania Railroad Company, Appellee. Appeal. Received & Filed Jan. 11, 1911. Saunders Lewis, Jr., Clerk. Wm. A. Glasgow, Jr., pro Petitioner.)

15 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of ppeals, for the Third District, do hereby Certify the foregoing to e a true and faithful copy of the original record and proceedings in his Court, in the case of Morrisdale Coal Company, Plaintiff in rror, vs. Pennsylvania Railroad Company, Defendant in Error, on le, and now remaining among the records of the said Court, in my ffice.

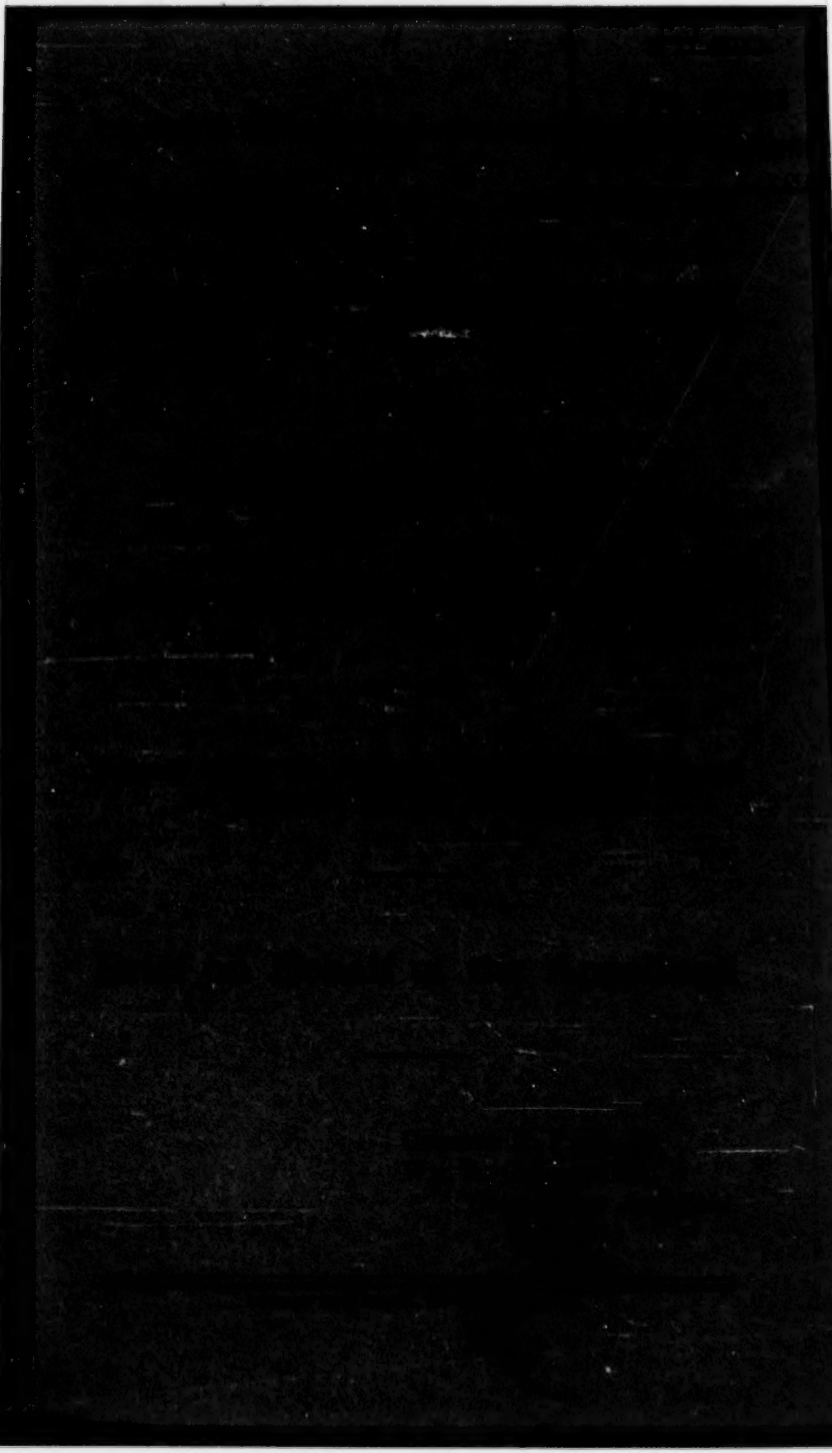
In Testimony Whereof, I have hereunto subscribed my name and ffixed the seal of the said Court, at Philadelphia, this 13th day of anuary in the year of our Lord one thousand nine hundred and leven and of the Independence of the United States the one hundred nd 35th.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. —. — Term, 191–. United States Circuit ourt of Appeals. Third Circuit. Certified Copy.

Endorsed on cover: File No. 22,486. U. S. Circuit Court Appeals, 3d Circuit. Term No. 488. Morrisdale Coal Company, appellant, vs. Pennsylvania Railroad Company. Filed January 21st, 911. File No. 22,486.



IN THE

Supreme Court of the United States.

No. 488. October Term, 1911.

MORRISDALE COAL COMPANY,
Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF THE APPELLANT.

I. STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

This was an action brought March 3rd, 1908, by the Morrisdale Coal Company, appellant, against the Pennsylvania Railroad Company, appellee, for damages arising from not furnishing plaintiff its proportion of cars for shipment of coal under the rules established by the appellee, and for violation of its rules re-

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IN THE

Supreme Court of the United States.

No. 488. October Term, 1911.

MORRISDALE COAL COMPANY,
Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF THE APPELLANT.

I. STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

This was an action brought March 3rd, 1908, by the Morrisdale Coal Company, appellant, against the Pennsylvania Railroad Company, appellee, for damages arising from not furnishing plaintiff its proportion of cars for shipment of coal under the rules established by the appellee, and for violation of its rules re-

sulting in unjust discrimination against the appellant in the distribution of coal cars by the appellee on the Tyrone Division of the Pennsylvania Railroad in what is known as the Clearfield Region.

The Pennsylvania Railroad Company, during the period covered by the complaint, made up a daily distribution sheet, showing the number of cars to which the region in question was entitled, the number of cars actually in the region, the rating in cars, figured on a percentage basis, to which each mine in the region was entitled, and the number of cars received by each mine.

The rule as to car distribution at that time in force on the Pennsylvania Railroad in the Clearfield Region was that each mine was entitled to its percentage rating, based upon relative capacity to produce coal, of "the equipment for distribution" daily in the region (Rec. pp. 14, 15). This rule of car distribution was uniformly violated by the Pennsylvania Railroad Company with respect to the appellant in the following manner. Instead of taking the percentage to which each mine was entitled according to its rated capacity as a percentage of the entire number of cars in the region, or the entire amount of "equipment for distribution" the Pennsylvania Railroad Company arbitrarily deducted from the equipment in the region, (1st) individual cars, or cars which were owned by certain of the mines in the region and upon which the Pennsylvania Railroad Company paid the mines a certain wheelage or rental, at the rate of six mills per ton per mile (Rec. p. 57); (2nd) cars which were used for the purpose of transporting fuel coal for the use of the Pennsylvania Railroad Company; and (3rd) cars which were sent into the field by other railroad companies for the transportation of fuel coal for the use

of such other railroad companies, which cars were known as "foreign fuel cars". The cars remaining in the region after these deductions had been made were daily distributed, and upon the number of these cars only was the percentage rating of the mine applied, and such percentage of cars was furnished to the mines respectively (Rec. p. 58).

The rule as to car distribution above set forth continued in force until January 1, 1906, when the appellee changed entirely its rules upon that subject.

During the times when there was no car shortage in the region, no complaint was made by the appellant, those of course being the times when the other operators in the region did not desire the cars, or when there was an ample supply on the part of the railroad company for all purposes, and when the price of coal in the market was exceedingly low (Record, pp. 13, 31). But during periods of car shortage in the region, when the demand for coal in the market was active and the requirement for cars was heavy and the supply insufficient, the appellant showed that its mines received a deficiency of cars, according to the percentage rating given to it by the Pennsylvania Railroad Company, applying to "the same equipment for distribution" and available for shipment of coal, in accordance with the rule established by the appellee. On page 27 of the Record is a detailed statement showing the total number of cars in the region, the rating of the appellant's mines, the number of cars it received, and the deficiency on its percentage during the months of car shortage; also the rating of the Berwind-White Coal Mining Company, the number of cars received by it, and the excess of cars received by the said Company over its percentage during the months of car shortage, it appearing invariably, with

but one trifling exception, that at these periods of car shortage when the demand for cars was great, the Pennsylvania Railroad Company violated its rule as to car distribution, and the appellant was discriminated against by not receiving its full quota of cars under the rule established by the Pennsylvania Railroad Company; the Berwind-White Coal Mining Company receiving numbers of cars largely in excess of the percentage to which it was entitled, thus showing a discrimination in favor of the Berwind-White Coal Mining Company as against the appellant company.

Mr. Wigton, President of the appellant company, testified that the effect of the failure to furnish the cars to which his company was entitled, or the irregular furnishing of them, sometimes in excess and sometimes in deficient numbers, resulted in his company being unable to fulfill the obligations which it had entered into for the delivery of coal, and as a result he was forced to go into the market and purchase coal to fulfill his contracts on the best terms and at the best prices that he could. The insufficient and irregular supply of cars further prevents the regular working of the colliery (Record, p. 15). And in addition to this, much expense was incurred by keeping the colliery in constant operation, the pumps being kept going constantly in order to keep water out of the mines; and all the expenses that applied to the preservation of the mine and the conduct thereof had to continue while the mine was in idleness, thus increasing the cost *per ton* of such coal when it was produced (Record, p. 15). He further testified (Record, p. 15) that he informed the Pennsylvania Railroad Company's officials of the fact that his Company had contracts to fill, that cars were required for that purpose, and that during the entire period of time covered by the claim for damages

in this case he was repeatedly and constantly informing the officials of the appellee company of this situation with respect to the necessity of his having cars in order to fill his contracts, and making demand upon the appellee company for the cars in question.

It was in evidence that the Morrisdale Coal Company, at all times, was ready and able to ship all the coal which it would have been entitled to ship had the cars which its percentage rating entitled it to under the established rule, been furnished to it, and that when any excess of cars was given to it, at times when there was no demand for cars and when other operators in the district did not want them, the appellant company regularly loaded these excess cars and shipped them to market, showing that the capacity of the mine was even greater than the rating given to it by the Pennsylvania Railroad Company (Record, p. 14).

It further appeared in the testimony (Record, p. 37), that the appellant company had contracts for delivery in interstate shipments which required regular daily, weekly and monthly deliveries, and consequently it became absolutely essential for the proper conduct of the appellant's business that there should be a regular daily supply of cars, and not a supply which was uncertain and irregular.

Appellant's damage was then estimated as follows: On the sheet offered in evidence (Record, p. 27), the shortage of cars reduced to terms of wooden cars, which held, according to the railroad company's calculations, twenty-five (25) tons, was figured out in tons. Some slight differences in calculation between the appellant and the appellee from the appellee's distribution sheets were discovered during the trial, which modified the appellant's estimate, which modification

was allowed for by agreement in the final verdict; but for the principle involved, the figures contained on page 27 and the other sheets offered by the appellant can be assumed to be correct.

This tonnage showed various deficiencies. In the month of June, 1902, there was a deficiency of 3075 tons which the appellant should have shipped, and which amount, if it had received the cars, it could have mined and shipped; but, having no cars and being unable to ship this tonnage, and being required to fill contracts which it had entered into, the appellant was compelled to go into the market and buy coal for the purpose of filling this deficiency caused by the railroad company's violation of its established rule, and default. The average price at which the appellant company purchased coal for the purpose of filling these contracts, during the month of June, 1902, was $1.93 per ton. Had it been able to ship these 3075 tons at its own mines and in the cars which it is alleged the railroad company should have furnished to the appellant, the cost of mining this coal, the evidence showed, would have been 97 cents a ton, including royalty; or, in other words, on this 3075 tons the appellant company, by reason of the railroad company's default, was compelled to pay ninety-six (96) cents a ton (the difference between $1.93 and 97c.) in excess of what it would have cost it to mine the coal and put it on the railroad company's cars, had those cars been furnished, according to the rule established for distribution thereof. This ninety-six cents, the damage per ton, multiplied by the number of tons, 3075, gave the damage for the month of June, 1902. See Record, pp. 34, 35, 36, where is found a statement of the damages in each month for which damages are claimed figured on this basis. In addition thereto, the

extra expense of mining the coal actually mined and shipped, as compared with the expense of mining it had the proper proportion of cars been furnished to appellant, was figured out as five cents (5c.) per ton. The basis of this calculation is found on pp. 31, 32, 33 of the Record. This sum is also found in the statement on p. 35, and is added to the damages. The claim for damages on this basis, after correcting the error found in the figures, amounted, with interest, to Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09).

The questions thus raised were tried before a jury and a special verdict was rendered on November 17, 1909, for the above amount (Record, pp. 10, 11). The plaintiff moved the Court, on November 29th, 1909, to enter judgment upon the verdict. Pending a decision upon this motion for judgment, the Supreme Court of the United States handed down an opinion on January 10, 1910, in the case of Baltimore & Ohio Railroad Co. vs. United States of America, ex rel. Pitcairn Coal Company et al. (215 U. S. 481). Upon the strength of this opinion the appellee filed, on January 31, 1910, a motion to dismiss the action for want of jurisdiction. The plaintiff's motion for judgment on the verdict, as well as the motion to dismiss for want of jurisdiction, was argued and the latter motion was sustained in an opinion by McPherson, J., who entered judgment dismissing the case (Record, p. 83).

An appeal was taken from this judgment to the Circuit Court of Appeals for the Third Circuit and a Writ of Error was allowed February 10, 1910, (Record, p. 102). Assignments of Error were filed by the appellant to the action of the court dismissing the cause for want of jurisdiction; to the action of the court in not entering judgment in favor of the

plaintiff for Sixty-seven thousand one hundred fifty-six dollars and nine cents ($67,156.09); to the action of the court in not affirming the plaintiff's points, which referred, (1) to the failure of the Railroad Company to observe and enforce its rule as to the distribution of cars; and (2) to the proper measure of damages to be applied for the alleged discrimination.

The case was argued in the Circuit Court of Appeals *in extenso* on its merits; and the court had prepared an opinion (Record, p. 105), but before filing it the appellee presented a petition for the dismissal of the writ of error, on the ground that under the provisions of Sections 5 and 6 of the Act Establishing the Circuit Court of Appeals, that Court had no appellate jurisdiction of the case (Record, p. 112). The question thus raised was then argued separately and the motion to dismiss the writ of error was denied. (See Opinion, Record, p. 112). A judgment was entered by the Circuit Court of Appeals, filed January 10, 1911, reading as follows (Record, p. 124):

> "This cause, being heard upon the record and argument of counsel, both upon the merits and upon the jurisdiction of the Circuit Court to entertain the action, and the record presenting for necessary consideration the proper construction of the Act to Regulate Commerce and the claim of jurisdiction in the Circuit Court not resting solely upon diversity of citizenship of the parties, and this Court being of opinion that the sound construction of the different provisions of the Act to Regulate Commerce as amended and now in force necessarily forbid the exercise of jurisdiction in this case by the Circuit Court, it is adjudged and ordered that the judgment of the Circuit Court, dismissing the case, be affirmed and that the defendant recover of the plaintiff its costs in this behalf expended."

From this judgment the present appeal is taken. The questions accordingly raised are as follows:

1. Preliminarily, the question whether or not this appeal should have been prosecuted directly from the Circuit Court to the Supreme Court, or whether it was properly taken first to the Circuit Court of Appeals and thence to this Court.

2. The question whether, under the Act to Regulate Commerce, original jurisdiction in this case existed in the United States Circuit Court.

3. The question whether the failure of the appellee to enforce its rule as to car distribution was such as to give an undue or unreasonable preference or advantage to any particular company, firm, corporation or locality, and to subject the appellant to any undue or unreasonable prejudice or disadvantage, under the terms of the Act to Regulate Commerce.

4. Whether the measure of damages adopted by the appellant was the proper method by which the damages should be estimated, provided the unlawful discrimination existed, and whether this Court should direct that judgment be entered on the verdict aforesaid.

II. SPECIFICATIONS OF ERROR.

The following are the specifications of error filed (Record, pp. 127, 128):

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, sustaining the motion of the defendant to dismiss this cause for want of jurisdiction.

II.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the Circuit Court had jurisdiction of this cause.

III.

That the said Circuit Court of Appeals erred in failing to direct the Circuit Court to enter judgment in favor of the plaintiff in the sum of Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09).

IV.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and in failing to direct that in periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Railroad Company could not furnish all the cars required for the shipment of coal by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was entitled each day to have assigned to its use the number of cars which its percentage of all such available cars would award to it in accordance with the system of distribution in effect.

V.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and the action of the Circuit Court in failing to direct that if the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant. The damages should be estimated as follows: The jury should first determine the difference in tonnage between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region. This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts for shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled.

ARGUMENT.

A. On the question as to whether or not the Appeal from the Circuit Court should have been taken direct to the Supreme Court or to the Circuit Court of Appeals.

It was argued by the appellee in the Circuit Court of Appeals that the proper procedure on the part of the appellant upon the adverse decision of the Circuit Court, was to appeal direct to the Supreme Court, under the provisions of Sections 5 and 6 of the Act establishing the Circuit Court of Appeals. These sections are as follows (Record, p. 112):

> "SECTION 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: (1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. * * * * *
>
> SECTION 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

Before taking up a discussion of the authorities upon this point it would be well to lay before the Court the actual procedure which occurred in the court below. It is as follows:

Issue having been joined by the pleadings, a jury was empaneled on the 16th day of June, 1909, which, after hearing the evidence both for the plaintiff and defendant, returned their verdict as follows (Record p. 10):

"We find as a fact that the amount of the plaintiff's claim is correct and is contained in its exhibit 2, and is

Principal	$51,640.60
Int.	15,515.49
Total	$67,156.09

Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.

If the Court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

It will be observed that by this verdict the jury found "The plaintiff's claim is correct and is contained in its exhibit 2 and is (total) $67,156.09."

But the jury also in their verdict provided that

> "If the Court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover."

And also

> "If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

At the trial, the plaintiff submitted to the Court points of charge on the law as shown on page 79, and the defendant offered points of charge on the law, as shown on page 80, and the Court said (Record, p. 79):

> "The points of the plaintiff and defendant respectively are not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant."

Thereupon the plaintiff, on the 29th day of November, 1909, filed a motion for judgment in its behalf for the sum of Sixty-seven thousand, one hundred and fifty-six dollars and nine cents ($67,156.09), and two months thereafter, on the 31st day of January, 1910, the defendant moved the Court to dismiss the action for want of jurisdiction to entertain the same (Record, p. 82). Upon the hearing on these two motions, the Court rendered an opinion holding (Record, p. 84):

> (1) "There is no 'rule of law' that requires the aggregate of available cars always and everywhere to be divided ratably in times of shortage."

and this was the conclusion reached by the Court after stating:

> "It will at once be observed that the suit requires a Court and jury to decide whether the defendant's method of distribution offended against the Act. The questions are, (1) whether this method gave a preference to any particular person, company, firm or corporation, or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable."

and thereupon the Court held that the propositions of law asked for by plaintiff (appellant) and which the Court had failed to approve (granting plaintiff an exception) were not correct and that there was no "rule of law" requiring available cars always and everywhere to be divided ratably in times of shortage.

(2) The Court further held that the primary jurisdiction to award damages which "may have been caused by a preferential practice in distributing coal cars in case of shortage" was in the Interstate Commerce Commission, and "that the circuit court has not the primary power to award such damages", and thereupon directed that the defendant's motion to dismiss the suit for want of jurisdiction be granted, and awarded the plaintiff an exception thereto.

On the 10th day of February, 1910, judgment was entered in the cause in favor of the defendant.

Thereupon a writ of error was sued out in the Circuit Court of Appeals and the errors assigned are to be found on pp. 100 and 107 of the Record, and it will be seen that in addition to assigning for error that the lower Court had sustained the motion of defendant to dismiss the cause for want of jurisdiction, the plaintiff assigned as its third ground of error "That the learned Court erred in not entering judgment in favor of the plaintiff in the sum of Sixty-seven thousand one hundred and fifty-six dollars and nine cents ($67,156.09)", in accordance with the special verdict of the jury (Record, p. 10). In other words, this assignment of error brought up every question in the case, and not alone the question of jurisdiction, and if the Circuit Court of Appeals should have found that the Circuit Court had jurisdiction, then the Circuit Court of Appeals must have further determined whether or not the plaintiff was entitled to a judgment on the special verdict and for what amount.

The fourth and fifth assignments of error brought up to the Circuit Court of Appeals for consideration the law of the case covering the right to damages and the amount thereof following the provision in the special verdict authorizing the Court to enter judgment for

such amount as the Court might determine the plaintiff was entitled to under the law, and these assignments of error follow the exception which was allowed by the Circuit Court, at the bottom of page 119 of the Record, and at the top of page 120, and the finding of the Court as to there being "no rule of law" governing *pro rata* car distribution "in times of shortage".

I.

As we understood the case presented to the Circuit Court of Appeals, not only the question of jurisdiction was involved, but the plaintiff's whole case was brought up for determination in that Court.

Counsel for both plaintiff and defendant so understood the case when it was first argued in the Circuit Court of Appeals before the question of the propriety of the appeal had been raised, for the briefs in that Court in behalf of both plaintiff in error and defendant in error, show that there was presented to the Court for consideration not only the question of jurisdiction of the Circuit Court but also whether upon the whole case the plaintiff was entitled to a judgment, if the Circuit Court of Appeals should determine that the Circuit Court had jurisdiction. It was only after months had elapsed, that the defendant in error filed its motion in the Circuit Court of Appeals for dismissal of the Writ of Error in this case on the ground that "Under the statutes of the United States regulating writs of error to the Circuit Court" the Writ of Error taken to the Circuit Court of Appeals in this case was properly issuable only out of the Supreme Court of the United States.

In the case of Wirgman v. Parsons, 126 Fed. 449, in the Circuit Court of Appeals for the Fourth Circuit, a somewhat similar condition arose.

There was a question of jurisdiction involved in the decision of the Circuit Court, and a Writ of Error to the Circuit Court of Appeals, and upon the argument of the case, upon appeal, the question of jurisdiction was discussed, as well as other points, by both parties to the appeal. The Circuit Court of Appeals found that the Circuit Court had jurisdiction and thereupon a petition for re-hearing was filed, setting up that the Writ of Error in the case should have been sued out in the Supreme Court of the United States instead of the Circuit Court of Appeals, and that, therefore, the Circuit Court of Appeals had no jurisdiction. In commenting upon this belated position, the Circuit Court of Appeals (Norris, J.) said:

> "Nothing was said in their briefs here, nor in the oral argument before the Court, challenging in any way the jurisdiction of this Court to hear their appeal. On the contrary, the judgment and decision of this Court was earnestly invoked by both sides. It thus appears that the whole case came into this Court, and that it had taken jurisdiction of the whole case. That being so, it is not competent for counsel by their voluntary action to attempt to limit the jurisdiction of the Court. When the case was decided in the Court below, the appellant had his option to take the case to the Supreme Court of the United States on the question of jurisdiction alone, or he could have done as he has done—take the whole case to this court."

citing numerous cases and further saying:

> "In Reliable, etc., Co. v. Stahl, 105 Fed. 663, a case carried to the Circuit Court of Appeals on bill of exceptions, one of which went to the jurisdiction of the court below and others to the merits, when the case got up into the Circuit Court of Appeals, it was found that for lack of a proper appeal, or for non-compliance with the rules, the exceptions to the merits could not be heard. It

was held that this did not deprive the Circuit Court of Appeals of jurisdiction to hear the case.

Our conclusion is that, the appellants having elected to appeal the whole case to this court and the whole case having come into this court for adjudication, we had the choice either to certify the question of jurisdiction to the Supreme Court, or ourselves to decide the question. 'Of course the power to certify assumes the power to decide.' U. S. v. John, *supra.*"

So that we submit that this case having been argued in the Circuit Court of Appeals upon all the questions involved and which were before the Circuit Court, including the question of whether the damages found by the jury were properly recoverable under the law; that the position of defendant in error that the single question of the Court's jurisdiction was involved in the writ of error taken to the Circuit Court of Appeals, was certainly belated and entitled to no more consideration than was absolutely required.

As we understand the rule "the question of jurisdiction which the Judiciary Act of March 3d, 1891," Chapter 517—26 Stat. 826 (Sec. 5), paragraph 1,—"permits to be certified directly to this (Supreme) Court must be one involving the jurisdiction of the Circuit Court *as a Federal Court and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing of concurrent jurisdiction as between themselves.*" Louisville Trust Co. v. Knott, 191, U. S., 225.

The case now before the Court is an action of trespass founded upon a statute passed by Congress and therefore the general jurisdiction of the Circuit Court of the United States would attach thereto, both as to the form of action and as to the subject matter, the claim for damages having arisen under an Act of Con-

gress, but the Circuit Court held that in order that the action be maintained it was necessary to show that the Interstate Commerce Commission had primarily passed upon the questions of car distribution which were attacked by the plaintiff, and that the plaintiff having failed to show that the Interstate Commerce Commission had primarily passed upon these questions and found them to involve discrimination under the Act to Regulate Commerce, that the Circuit Court of the United States was without jurisdiction to pass upon the questions involved in the case. This want of jurisdiction of the Court, as found by the Judge of the Circuit Court, was not a want of jurisdiction of the Circuit Court *as a Federal court,* but the finding of the Circuit Court would apply equally to any Court, State or Federal, to wit: that in order to maintain the case it was necessary to show, as part of the plaintiff's evidence, that the Interstate Commerce Commission had passed upon the question of car distribution attacked by the plaintiff. If these questions of car distribution had not applied to interstate commerce, then the Federal court would have had no jurisdiction of the subject matter as a Federal court, but where the Court, as constituted, has general jurisdiction of the subject matter, to wit: an action of trespass arising under an Act of Congress, it cannot be said that the finding of the Circuit Court was that the Court had not jurisdiction *as a Federal court because* it held that it was necessary to show as part of the plaintiff's evidence that the Interstate Commerce Commission had primarily passed upon the questions of car distribution involved in the case.

Our position on this point is clearly sustained by the case of *Louisville Trust Company v. Knott,* 191 U.

S. 225. That case arose out of conflicting claims by the Circuit Court of the United States for the Western District of Kentucky and the Circuit Court of Jefferson County, Kentucky, as to the right to administer the property of the Evening Post Company, a Kentucky corporation. The Federal Court had possession, by its receiver, of the property of the Company and declined to surrender it to the Louisville Trust Company, the receiver appointed by the State court, and dismissed an intervening petition filed by the latter Company, and, from the order dismissing this petition, an appeal was prosecuted and "granted solely upon the question of jurisdiction over the subject-matter of the trust estate of the Evening Post Company in controversy, and the question of whether this (Circuit Court), or the said Jefferson Circuit Court, Chancery Branch, First Division, has prior jurisdiction," it being stated in the order that the single question upon which the cause was decided was as to whether the United States Circuit Court had jurisdiction over the said trust estate, and whether such jurisdiction was prior and exclusive of that of the State court, and the appeal was prosecuted to the Supreme Court of the United States.

The Supreme Court held that this was not such a question of jurisdiction as authorized a direct appeal to the Supreme Court of the United States from the Circuit Court, under Section 5 of the Judiciary Act of March 3d, 1891.

The Court, speaking through Mr. Justice Harlan (p. 232) said:

> "By the Judiciary Act of March 3d, 1891, c. 517, 26 Stat. 826, an appeal or a writ of error, as the one or the other mode may be proper, can be taken directly from a Circuit Court to this Court in certain specified cases, among which is 'any

case in which the jurisdiction of the court is in issue'; and 'in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.' Sec. 5. In all cases, other than those specified in section five of that act, the Circuit Court of Appeals is given appellate jurisdiction. Sec. 6.

The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not 'in issue'. There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that Court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company. What the Circuit Court did in that respect was questioned by the Trust Company, on behalf of the state court, solely upon the ground that the taking by the Federal court of possession of the property and assets of the Post Company—after the state court by the institution of the Haldeman suit had acquired authority to appoint a receiver of such property and assets for administration—was in violation of the rule recognized in courts of equity, whether of Federal or state origin, that 'where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court'; that, as the object of the suit in the state court could not be accomplished without possession of the property and assets of the Post Company, the seizure of such property and assets under the order of the Federal court, whereby the state court was prevented from giving any effectual relief to the parties before it, was inconsistent with the re-

lations which, upon principles of comity and right, always exist between courts having concurrent jurisdiction over the same subject matter. *Peck v. Jenness*, 7 How. 612,624; *Taylor v. Carryl*, 20 How. 583, 596.

In all this there was nothing involving the jurisdiction of the Circuit Court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.

We think this question was substantially so determined in *Smith v. McKay*, 161 U. S. 355, 357. That was a suit in equity for an injunction to restrain the defendants from using certain patented machines until they had fully paid the fees they had agreed to pay to the patentee. The defendants moved to dismiss the bill upon the ground that there was a plain, adequate and complete remedy at law—thus raising only a question of equity jurisdiction. The motion to dismiss was denied. After final decree for the plaintiff, the case was brought directly to this court by appeal, and it was assigned for error that the Circuit Court erred in not dismissing the suit for want of jurisdiction. The position of the appellee in that case was that only questions of Federal jurisdiction could be brought directly here; and that if the Circuit Court had jurisdiction of the parties and of the matters in dispute, the fact that the remedy of the plaintiff was at law, rather than in equity, raised no question of jurisdiction within the meaning of the fifth section of the Judiciary Act of March 3d, 1901, under which the appeal was taken.

The Court observed that the question had never been directly decided by it, but that it arose

in the *World's Columbian Exposition case, 18 U. S. App. 42,* in which the Circuit Court sitting in equity granted an injunction to prevent the opening of the Exposition Grounds to the public on Sunday. That case was taken by appeal to the Circuit Court of Appeals for the Seventh Circuit, and a motion was there made to dismiss the appeal. Chief Justice Fuller, speaking for that Court said:

> 'The Appellees have submitted a motion to dismiss the appeal upon the grounds that the jurisdiction of the Circuit Court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States, and not to this court; and hence that this appeal, which is from an interlocutory order, cannot be maintained under the seventh section of the Judiciary Act of March 3d, 1891. We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act.'

Referring to these observations of the Chief Justice, this Court in *Smith v. McKay,* said:

> 'We regard this as a sound exposition of the law, and applied to the case now in hand, it demands a dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The appellant's contention in this respect would require us to entertain an ap-

> peal from the Circuit Court in every case in equity, in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law. When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals.' 161 U. S. 355, 358.

In principle, the judgment in *Smith v. McKay* embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this Court from a Circuit Court.

The question again arose in *Blythe v. Hinckley,* 173 U. S. 501, 506, where this court said:

> 'Appeals or writs of error may be taken directly from the Circuit Courts to this Court in cases in which the jurisdiction of those courts is in issue, that is their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this Court. The Circuit Court held that the remedy was at law

and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States. *Smith v. McKay*, 161 U. S. 355; *Blythe Co. v. Blythe*, 172 U. S. 644. The Circuit Court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts. If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect.' "

According to the construction put upon the Interstate Commerce Act by the Circuit Court, the Interstate Commerce Commission is primarily authorized to consider and pass upon questions of car distribution "and to award reparation for such damages as may have been caused by a preferential practice in distributing coal cars in case of shortage", and the Court further held that it had not "the primary power to award such damages"; and the Court held that this construction of the Act to Regulate Commerce was necessary in order to prevent confusion between the administrative duties of the Interstate Commerce Commission and the orders or judgments of the Circuit Court of the United States or any other Court. The Court did not deny the jurisdiction of the Circuit Court of the United States in this case as a Federal court, but denied that any court, Federal or State, could pass upon questions of car dis-

tribution, and award damages therefor, until the Interstate Commerce Commission had primarily passed upon such questions of car distribution. It was more in the nature of a finding that the plaintiff's evidence did not show that the Interstate Commerce Commission had primarily passed upon the matters involved in the case, than a finding that the Circuit Court of the United States, as a Federal court, was without jurisdiction.

In the case of *Bache vs. Hunt*, 193 U. S. 523, it appears that Hunt, Receiver, filed a petition in the Circuit Court of the United States for the Northern District of Ohio in a foreclosure suit, of Continental Trust Co., &c., vs. Toledo &c. Railroad Co. and Jules S. Bache, et als., asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, and stock of the railroad company in the hands of the Farmers' Loan and Trust Company, to be reimbursed for amounts paid by him or his predecessor, as Receiver, in the extinguishment of prior claims which the bonds and stock had been deposited to secure. Bache, who was a citizen of New York, was ordered to demur, plead or answer the petition, and appeared specially and filed a plea to the jurisdiction of the Court as to the subject matter, because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition, in which suit a Receiver had been appointed of the securities forming the subject of Hunt's petition, and that the Court had no jurisdiction of his person because of the insufficiency of the method of service of the order. The plea of Bache was overruled, and he declining to plead further, the petition was taken as confessed as to him, and a decree was entered, subsequently, that Hunt or his successor in right, was entitled out of the securities, to be reimbursed in the

amounts which had been paid by him as Receiver in respect to the prior claims.

From this decree an appeal was taken directly to the Supreme Court of the United States, and that Court, in delivering its opinion by Mr. Chief Justice Fuller, said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal court. *Louisville Trust Company v. Knott*, 191 U. S. 225; *Blythe v. Hinckley*, 173 U. S. 501.
>
> Tested by this rule our jurisdiction fails, and the appeal must be dismissed."

There is no doubt that the plaintiff could have maintained an action for failure to deliver cars to it in a State court of Pennsylvania if it could maintain its action in any court. *Texas and Pac. Ry. vs. Abilene Cotton Oil Co.*, 204 U. S. 426; *Murray vs. Chicago & N. W. Rwy. Co.* (62 Fed. 24, supp. 42-43, s. c. 92 Fed. 868). It is equally clear that the opinion of the learned Circuit Court applies just as well to the jurisdiction of the State Courts as to the Circuit Courts of the United States in cases of this kind and holds that no judicial tribunal, State or Federal, can entertain an action for failure to furnish plaintiff its proper proportion of cars for use in interstate commerce until the fairness of the car distribution actually under discussion, has

been primarily passed upon by the Interstate Commerce Commission. The learned Court below took the position that the plaintiff's rights were "not subject to be judicially enforced" by any court, *State or Federal,* "at least until" the Interstate Commerce Commission, "clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions" (Record, p. 91) quoting from B. & O. R. R. Co. vs. U. S. ex rel. Pitcairn Coal Co., 215 U. S. 481.

In the case of Board of Trade vs. Hammond Elevator Co., 198 U. S. 424, the Supreme Court in referring to Section five of the Act of March 3d, 1891, says, at page 432:

> "The proper construction of this section has been the subject of frequent consideration in this Court, and it has been definitely settled that it must be limited to cases where the jurisdiction of the Federal court, as a Federal court, is put in issue, *and that questions of jurisdiction applicable to the State courts, as well as to the Federal courts, are not within its scope.*" (Italics ours.)

In the Abilene Cotton Oil Co. case (204 U. S. 426) the Court held that a State Court of Texas did not have jurisdiction of an action for damages on the allegation that the plaintiff had been charged an unreasonable rate, for the reason that the Interstate Commerce Commission had exclusive original jurisdiction, and on the authority of that case (R. p. 96) the Circuit Court in the present case held that it did not have jurisdiction, which ruling was equally applicable to any Court, State or Federal.

In the case of the Steamship Jefferson, 215 U. S. 130, the Court said:

> "It is settled that under the Act of 1891, in order to entitle to a direct appeal from the decree

of a District or Circuit Court dismissing a cause for want of jurisdiction, the decree which is sought to be reviewed must have involved the jurisdiction of the Court below as a Federal Court". Louisville Trust Co. vs. Cominger, 184 U. S. 18; Schweer vs. Brown, 195 U. S. 171."

The reasons of the lower Court and its holding of lack of jurisdiction were equally applicable to actions in all courts, State and Federal, and therefore we submit, as said by the Supreme Court in *Louisville Trust Company vs. Knott*, (*supra*), it was never intended under Section five of the Act of March 3d, 1891, "that any such question should be the basis of a direct appeal" to the Supreme Court of the United States from a Circuit Court.

See, also,

U. S. vs. Larkin, 208 U. S. 333.
American Banana Co. vs. United Fruit Co., 160 Fed. 184, 166 Fed. 261, 213 U. S. 347.

II.

By the Judiciary Act of March 3d, 1891, Section 5, it is provided:

"Section 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

First—In cases in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision", etc.

By Section 6 of the Act, the Circuit Court of Appeals is given appellate jurisdiction "to review by appeal or by

writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in'' Section 5 of the Act, above set forth. And the question now presented to this Court is whether the writ of error first sued out in this case should have taken the case to the Supreme Court direct or whether it was permissible to have the same heard by the Circuit Court of Appeals, and the true guide to the determination of this question is, whether the sole question involved upon the writ of error was one of jurisdiction of the Circuit Court or whether there were other questions involved in the writ of error, and if it should be found that there were other questions involved, as we most earnestly contend, then the Circuit Court of Appeals was the proper forum in which to determine the questions upon the first writ of error.

According to our view of this case—and the defendant in error also entertained the same view at the argument before the Circuit Court of Appeals, (which Court took the same view), there was involved in this case before that Court, not only the question of jurisdiction of the Circuit Court, but the question of whether, if the Circuit Court of Appeals should find that the Circuit Court had jurisdiction, it should direct the Circuit Court to enter judgment for the plaintiff for Sixty-seven thousand, one hundred and fifty-six dollars and nine cents ($67,156.09), or some part thereof, and that the Circuit Court erred in failing to give the plaintiff a judgment for the above amount, and also erred in failing to find the law as prayed for by the plaintiff and to which action of the Court an exception was granted to the plaintiff.

In speaking of Section five of the Judiciary Act of March 3d, 1891, the Supreme Court in the case of *Chappell v. U. S.*, 160 U. S. 499, at page 507 (Mr. Justice Grey) said:

"In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court. If both a question of jurisdiction and other questions were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this court cannot take jurisdiction under this clause of the statute."

By referring to the petition for writ of error (Record, p. 102) it will be seen that the petition and the allowance thereof by the Court was in the "usual and general form" setting forth the verdict on behalf of the plaintiff, the dismissal of the case for want of jurisdiction and "that the petitioners represent that in such judgment and *the proceedings had prior thereto in this cause,* certain errors were, in the opinion of your petitioner, committed in the said Court to the prejudice of your said petitioners, *all of which will more fully and in detail appear with the assignments of error, which are filed with this petition*", and by referring to the assignments of error it will be shown that the questions presented to the Circuit Court involved not only the question of jurisdiction, but the failure of the Court to enter judgment for the plaintiff and the failure of the Court to find the law of the case in accordance with the plaintiff's views as presented in its points of charge, to which an exception was allowed by the Circuit Court, as will appear in the Record (p. 81).

In discussing a similar question in the case of *McLish v. Roff*, 141 U. S. 661, the Supreme Court (Mr. Justice Lamar) said (p. 668):

"The true purpose of the act, as gathered from its context, is that the writ of error, or the

appeal, may be taken only after final judgment, except in the cases specified in Section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court."

In Coler v. Grainger County, 74 Fed. 16 (C. C. A. Sixth Circuit, before Taft and Lurton, Circuit Judges, and Hammond, J.) it appeared that a bill was filed by Coler against Grainger County, to enforce a written contract of subscription for $75,000 of the par value of the stock of a railroad company. Subsequently, an amended bill was filed and to the amended bill, a demurrer was entered, one of the grounds of the demurrer being that the Court was without jurisdiction. The Court sustained the demurrer on the ground that it was without jurisdiction of the subject matter of the amended bill, and thereupon an appeal was taken and error assigned to the decree of the Court that it was without jurisdiction, and other grounds of error were specified. In delivering the opinion of the Court, Taft, Circuit Judge, said (p. 20):

"It is first objected that this court has no jurisdiction of the appeal here taken, because it presents only the question of the jurisdiction of the court below. The argument is that by Section 5 of the Court of Appeals Act, where the question is alone of jurisdiction, it is to be certified to the Supreme Court, and by Section 6 of the same act the Court of Appeals is given jurisdiction only in those cases of appeal and error not provided for in Section 5. It has been held that, where the only question raised upon the record before the court of appeals is a question of jurisdiction of the

court below, the appeal must be dismissed, because the Court of Appeals is not vested with jurisdiction to consider that question only. *Manufacturing Co. v. Barber*, 9 C. C. A. 79; 60 Fed. 465; *Railroad Co. v. Meyers*, 10 C. C. A. 485, 62 Fed. 371; *Allen v. Strong*, 17 C. C. A. 124, 70 Fed. 273; *U. S. v. Severens*, 18 C. C. A. 314, 71 Fed. 768. The motion to dismiss the appeal, however, cannot be sustained in the case at bar, because the record does present questions other than that of the jurisdiction of the Circuit Court. This is quite evident from the assignments of error. It is true that the court below dismissed the bill for want of jurisdiction, but this court could not dispose of the case, should it disagree with the court below on the question of jurisdiction, without proceeding to consider the other grounds stated in the demurrer to the amended bill, which questioned the equity of the bill, and the validity of the county's subscription for stock. In such a case it is quite clear that an appeal lies to this court, and that *ex necessitate*, this court must consider the question of jurisdiction in order that it may proceed to decide the other questions raised upon the merits. *Railroad Co. v. Meyers*, 10 C. C. A. 485, 62 Fed. 371."

In the case of *Crabtree et al. v. Madden*, 54 Fed. 426 (C. C. A., Eighth Circuit, before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge), an action was brought in the United States Court in the Indian Territory by the Creek Tribe of Indians and Crabtree, to collect a tax which the Acts of Congress awarded to the Indian tribes. To the complaint, a demurrer was interposed:

(First) That the complaint did not state facts sufficient to constitute a cause of action;

(Second) That the Court had no jurisdiction of the subject matter or the parties; and

(Third) That the plaintiff had no legal capacity to sue.

The demurrer was sustained and upon a writ of error to the Circuit Court of Appeals to reverse the judgment sustaining the demurrer, the Court said (Sanborn, Circuit Judge) p. 427:

> "The contention of counsel for defendant is that the jurisdiction of the court below is the only question in issue in this case; that the Supreme Court has exclusive jurisdiction to hear and determine that question under Section 5, and hence this court has no jurisdiction to consider it. It is proper to notice that this is a writ of error to review a final judgment; that it brings up the entire case; and that, if this court was of the opinion that the court below had jurisdiction of the subject-matter and the parties, there would remain for determination the question whether or not the complaint states facts sufficient to constitute a cause of action; so that it can hardly be said that the question as to the jurisdiction of the court below is the only question here in issue. But if it was, and the question was clearly presented whether or not this court has jurisdiction to determine that question when a writ of error or appeal from a final judgment or decree, which brings up the whole case, presents to this court the single question of the jurisdiction of the court below, the decision of the Supreme Court has settled that question adversely to the contention of the defendant. In McLish v. Roff, 141 U. S. 661, 668, 12 Sup. Ct. Rep. 118,—a case from the United States Court in the Indian Territory,—in which all the provisions of the act creating this court that are material in this case were carefully considered, that court declared the right and privilege of the defeated party upon the entry of a final judgment in the court below to be as follows:
>
> 'When that judgment is rendered, the party against whom it is rendered must elect

whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case. If the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question to this court.'

The result is that when the party against whom a final judgment has been rendered in a District or Circuit Court of the United States elects to take his writ of error to a Circuit Court of Appeals upon the whole case, that court has jurisdiction to determine it, whether the question of the jurisdiction of the court below is the sole question or but one of many questions in issue under the writ. The plaintiffs in error have made their election to take their writ of error to this court upon the whole case, and the motion to dismiss the writ is denied."

In the case of *Loewe vs. Lawlor,* 208 U. S. 274, the questions presented for decision are stated briefly by Mr. Chief Justice Fuller, as follows:

"This was an action brought in the Circuit Court for the District of Connecticut under Sec. 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, claiming threefold damages for injuries inflicted on plaintiffs by a combination or conspiracy declared to be unlawful by the act.

Defendants filed a demurrer to the complaint, assigning general and special grounds. The demurrer was sustained as to the first six paragraphs, which rested on the ground that the combination stated was not within the Sherman Act, and this rendered it unnecessary to pass upon any other questions in the case; and upon plaintiffs declining to amend their complaint the court dismissed it with costs. 148 Fed. Rep. 924; and see 142 Fed. Rep. 216; 130 Fed. Rep. 633.

The case was then carried by writ of error to the Circuit Court of Appeals for the Second Cir-

cuit, and that Court, desiring the instruction of this court upon a question arising on the writ of error, certified that question to this court. The certificate consisted of a brief statement of facts, and put the question thus: 'Upon this state of facts can plaintiffs maintain an action against defendants under Section 7 of the Anti-Trust Act of July 2, 1890?'

After the case on certificate had been docketed here plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted and the whole record and cause being thus brought before this court, it devolved upon the court, under Section 6 of the Judiciary Act of 1891, to 'decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal'."

At page 296, the Chief Justice further says:

"But the objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute. Thus, it is said, that the restraint alleged would operate to entirely destroy plaintiffs' business and thereby include intrastate trade as well; that physical obstruction is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.

We think none of these objections are tenable. and that they are disposed of by previous decisions of this court."

So it will be seen that exactly the same question was involved in the case of *Loewe vs. Lawlor,* as is involved in the case now before the Court, one arising under the Act of Congress known as the "Act to Regulate Commerce", and the other under what is known

as the "Anti-Trust Act", and in both cases the lower Court held that the Court did not have jurisdiction under the Act of Congress, to entertain the plaintiffs' action under the facts shown, and in both cases a writ of error took the case directly to the Circuit Court of Appeals. In the case of *Loewe vs. Lawlor,* that Court certified the question of jurisdiction to the Supreme Court. In the case now before the Court, counsel for plaintiff in error, and defendant in error, argued both the question of jurisdiction and the other questions involved in the whole case before the Circuit Court of Appeals, to which it had already been submitted for decision.

B. On the question whether there was original jurisdiction in the Circuit Court.

I.

The appellee asserts, and the Court below decided that the Circuit Court had no jurisdiction in this case unless the manner of car distribution which was carried out by the appellee, and charged as being discriminatory, was first attacked before the Interstate Commerce Commission, and the questions involved in this case passed upon by that Commission in the first instance. In support of this position they cited the case of Baltimore & Ohio Railroad Co., appellant, vs. United States of America, ex rel. Pitcairn Coal Company, appellee, 215 U. S. 481; and the case of Texas & Pacific Rwy. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Our view, however, is that the Pitcairn Coal Company case and the Abilene Cotton Oil Company case, not only do not sustain the position taken by the ap-

pellee here, but sustain the appellant in the position that the Circuit Court had jurisdiction in this case.

Second, even if it was the duty of the appellant to first have the Interstate Commerce Commission find that the system of car distribution on the Pennsylvania Railroad, at the time covered by the Complaint in this case, was unjust and unreasonable or unjustly discriminatory or prejudicial, that the Interstate Commerce Commission had already ruled to this very effect as to the arbitrary assignment of individual cars, foreign railway fuel cars and the company's own fuel cars; and that therefore further application to the Commission was unnecessary under the decisions above set forth.

1. It is desirable in the very outset to understand exactly what was decided by the Court in the two cases above mentioned.

TEXAS & PACIFIC RAILWAY CO. vs. ABILENE COTTON OIL COMPANY, 204 United States 426.

In this case the Oil Company sued in the State courts of Texas to recover $1,951.83, claiming that on shipments of carloads of cotton seed oil over the Texas & Pacific Railway, the carrier had exacted, over the protest of the oil company, payment of an unjust and unreasonable rate. It further appeared that the rate charged the plaintiff was the one fixed in the rate schedules which the company had established, filed, published and posted, as required by Sec. 6 of the Act to Regulate Commerce, and that rate *was, at the time the suit was brought, the only established legal rate,* under the Act to Regulate Commerce, which the carrier could charge for the transportation referred to. The Supreme Court of the United States held that the

State court of Texas did not have jurisdiction, on the ground that, under the Act to Regulate Commerce, exclusive jurisdiction to determine the reasonableness of a rate *then on file* with the Interstate Commerce Commission, under Section 6 of the Act, was vested in the Interstate Commerce Commission, and that the courts could not entertain a suit based upon a charge that such legal rate, as filed, was unjust and unreasonable, until the Interstate Commerce Commission had passed upon that question.

And the Court gives its reasons for such conclusion as follows, pp. 439-441:

> "When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist *in the future from violating the act*, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint

made by a shipper without previous action by the Commission, *would give rise to a change of the schedule rate* and thus cause the new rate resulting from the action of the court to be applicable *in future* as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is *wholly inconsistent with* the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provisions endowing the administrative tribunal which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule,

conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." (Italics ours.)

It will be observed of course that in the Abilene Cotton Oil case, the question was *as to the reasonableness of a then effective legal rate in use at the time and applicable to the future,* and the effect of the Court holding that the rate was unreasonable would be to require the carrier to charge thereafter a different rate from that filed with the Interstate Commerce Commission.

In discussing Section 9 of the Act to Regulate Commerce, the Supreme Court says (pp. 441-442):

"Nor is there merit in the contention that Section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon the courts primarily to relieve from the duty of enforcing the established rate by finding that the same *as to a particular person or corporation* was so unreasonable as to justify an award of damages. *True it is that the general terms of the section when taken alone might sanction such a conclusion,* but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction con-

tended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the *ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.*" (Italics ours.)

We would therefore submit to the Court, that, under the Abilene Cotton Oil case, the courts have jurisdiction under Section 9, wherever the exercise of the jurisdiction by the courts cannot produce conflict or confusion between the administrative duties of the Commission under the Act to Regulate Commerce, and the judgment of the Court under Section 9 of the Act to Regulate Commerce.

PITCAIRN COAL COMPANY CASE.
(215 U. S. 481.)

This case was begun by petition under Section 23 of the Act to Regulate Commerce, praying for a man-

damus to require the Baltimore & Ohio Railroad Company to desist from the enforcement of the rules then established by the Baltimore & Ohio Railroad Company for the distribution of its coal cars, on the ground that the rules then in effect produced a discrimination against the plaintiff and an undue preference as to other persons. The rules then in force upon the Baltimore & Ohio Railroad as to car distribution were as follows:

> "Whenever the car supply is sufficient all orders are filled. Whenever in any district the car supply is insufficient to fill all orders, cars are distributed on a percentage basis after certain arbitrary assignments have been made, as follows:
>
> 1. B. & O. Railroad cars placed at mines for B. & O. fuel coal.
>
> 2. New mines are allotted an arbitrary number of cars daily or weekly for development. In cases where the inspection shows a marked increase in the capacity of certain mines, and it is not practicable to change the percentage of the whole district, proper arbitraries are applied pending a general revision.
>
> 3. Cars of foreign railroads assigned by them to their own fuel trade.
>
> 4. Cars of individual companies placed at mines owned by such companies, and cars owned by individual consumers placed at mines for their coal.
>
> There are also certain exceptions of a local character, as follows:
>
> 1. Curtis Bay premium. Whenever a shipper on the B. & O. Railroad handles cars at Curtis Bay promptly in any one month, he is allowed in the succeeding month a premium of fifty per cent. of the number of cars so handled, in addition to his regular percentage. This in lieu of an assignment of cars to the Curtis Bay trade.
>
> 2. At certain points noted on the percentage

sheets, an arbitrary number of cars is assigned to mines on fire.

3. At certain mines in the immediate vicinity of industries, empty cars intended for loading at such industries are first sent into the mines for loading coal for such industries.

4. Where annual contracts are placed for foreign railroad fuel coal with mines on the B. & O., arrangements are made that if the foreign railroads' cars are furnished for this fuel coal, the B. & O. will allow the mines shipping the coal a number of B. & O. cars equal to the foreign cars furnished.

5. When mines are connected with foreign railroads as well as with the B. & O., their rating is reduced fifty per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats."

In the Pitcairn case the Supreme Court held that the exercise of jurisdiction by the Court to require by mandamus the institution of new rules for car distribution for the future, was inconsistent with the administrative duties of the Interstate Commerce Commission under Section 15 of the Act to Regulate Commerce, and, therefore, the Commission having the power, under Section 15, to determine and prescribe the practice to be thereafter observed by the railroad company with regard to the rule for the distribution of coal cars, that a proceeding could not be sustained in the courts until the Commission had passed upon the reasonableness of the method of distribution which the railroad company then had in effect.

In the case now before the Court, it is to be noted that the attack in this instance is not made upon the rule of car distribution laid down by the Pennsylvania Railroad Company but upon the continuous violation of it by the Pennsylvania Railroad Company in the Clearfield Region, to the prejudice of the appellant.

The complaint of the Morrisdale Coal Company in this case covers the period from March, 1902, to December, 1905, inclusive and grows out of its failure, upon demand, to receive from the Pennsylvania Railroad Company sufficient coal cars for its requirements during that period. The duty of the railway carrier under the Act to Regulate Commerce during the period aforesaid, is stated by the Supreme Court of the United States in the case of *Interstate Commerce Commission vs. Illinois Central R. R. Co.*, 215 U. S. 452, at page 494, as follows:

> "It may not be doubted that the equipment of a railway company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the Governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one."

The statement of claim in this case was based upon this principle of law as follows (Record, p. 6):

> "During the time mentioned herein, and now, it was and is unlawful for the said Pennsylvania Railroad Company to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and it was the duty of the said railroad company, during the time hereinafter mentioned, and now, to offer all reasonable, proper, sufficient and equal facilities to all shippers of coal over its said railroad or line, and to make a fair and proportinate distribu-

tion of its car supply and other vehicles, and all instrumentalities and facilities for shipment and carriage, irrespective of ownership or contract embraced or implied for the use thereof, for the accomodation of all shippers alike in the said district hereinbefore described. *And it was also the duty of the said railroad company to distribute all cars in service on its road fairly and proportionately to the said coal mines on, and to shippers of coal over its said railroad.*"

The statement of claim then proceeds to set forth the method of the rating of the capacity of mines and collieries in the Clearfield Region, upon which the Pennsylvania Railroad Company proposed to base, in times of car shortage, a pro rata and equal distribution of cars in the proportion of the capacity of each mine, showing that the plaintiff during said period under said plan was entitled to receive a certain proportionate part "*of the cars in said district*" upon daily allotment thereof.

The statement of claim then proceeds as follows (Record, p. 7):

> "Nevertheless plaintiff avers that the defendant, in violation of its duty to the plaintiff to see that no undue or unreasonable preference or advantage was given to any person, company, firm, corporation or locality in the said district, or to subject any particular person, company, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage, failed and refused* * * to deliver to the plaintiff, on reasonable demand being made therefor, by the plaintiff, the plaintiff's due proportion or daily allotment of cars which * * * the defendant should have sent to the plaintiff's mines for the purpose of plaintiff's shipments of coal, as before set forth."

It may not be doubted that at common law as well

as under the Act to Regulate Commerce, the carrier, if offered freight, (1) must furnish the required transportation, (2) or excuse itself by saying that the notice was too short or uncertain, (3) or by saying that its equipment was sufficient to meet all reasonable expectations of demands upon it, accompanying this by a tender of a proportionate share of the available cars and facilities in service. This last (3) is the answer of the Pennsylvania Railroad Company, involved in this case, upon demand for coal cars, in times of shortage, and it established a rule providing for such proportionate distribution of coal cars.

The plaintiff produced Frank H. Wigton, who testified as to the rule of distribution of coal cars in time of shortage *established by the Pennsylvania Railroad Company in the Clearfield Region,* during the time covered by this complaint, as follows (Record, p. 13):

"Q. And for the periods covered by your claim, are only periods when there is a car shortage in the field?

A. That is correct.

Q. During the time there is not a car shortage there is no complaint covered by this proceeding?

A. There is not.

Q. What do you mean by car shortage?

A. Only there are insufficient cars to meet the requirements or demands of the several operators in the field.

Q. In the territory?

A. Yes.

Q. Will you explain to the jury when there are not enough cars for filling the requirements of the shippers in the district or region, how are the cars divided that are available for shipment by the Pennsylvania Railroad Company?

A. The Railroad Company establish a capacity for each colliery in the district.

Q. They do that with their own engineers or men?

A. They do that entirely of their own initiative by themselves. Having established this rating, the aggregate of that rating is called the capacity of the region.

Q. You mean the capacity of shipping coal?

A. The capacity to mine and ship coal, and whatever proportion your rating bears to the 100 percentage of aggregate is your proportion of the car supply which they furnish, and it is divided in that way.

Q. And that is worked out to a percentage basis, is it?

A. It is.

Q. *And to each of the mines in the territory is assigned a percentage of the equipment for distribution?*

A. *There is.*"

The rule, therefore, established by the Pennsylvania Railroad Company was that each colliery in the Clearfield Region was entitled to an ascertained percentage "*of the equipment for distribution*". This is shown by plaintiff's Exhibit A (Record, p. 27), where one column of the statement shows the rated percentage of the Berwind-White Coal Mining Company, and another column that of the Morrisdale Coal Company during the period covered by this complaint, *as established by the Pennsylvania Railroad Company*, and daily applicable, according to the testimony of Mr. Wigton, to "*the equipment for distribution*".

The above being the rule established by the Pennsylvania Railroad Company for car distribution, it appears, according to the plaintiff's claim, that the Pennsylvania Railroad Company violated this rule by not applying the percentage distribution to "the equipment for distribution" during the period covered by

the complaint, but taking all of the cars in the field daily and which should have been distributed pro rata, it deducted from such aggregate all individual or privately owned cars, all cars for use in the transportation of fuel coal for the Pennsylvania Railroad Company, and all cars of foreign railroad companies used for the transportation of fuel coal for such companies (Record, pp. 63-4), and the balance of the equipment in the field for distribution, after this arbitrary violation of the rule requiring a percentage assignment "of the equipment for distribution", was daily divided upon the percentages established in accordance with the rule of the Pennsylvania Railroad Company.

This case, therefore, arises not upon an attack upon the rule of car distribution as unreasonable or unfair, nor upon any effort of the plaintiff to require a present and future fair distribution of cars, as in the case of *Pitcairn Coal Co. vs. Baltimore & Ohio Railroad Co.*, but the plaintiff's grievance lay in the fact that after having established a rule for daily percentage distribution of cars during periods of shortage, applicable to "the equipment for distribution", the Pennsylvania Railroad Company, so far as the plaintiff's rights are concerned, violated this rule by unlawfully excluding from "the equipment for distribution", certain cars and giving them as a preference to the Berwind-White cars which it was entitled to under the very rule established by the Pennsylvania Railroad Company.

In the Pitcairn Coal Company case the rules of car distribution above set forth were carried out by the Baltimore and Ohio Railroad Company, and the complaint was that the rules were unfair and a mandamus was asked to require enforcement of other rules for the future. In this case no complaint is made as to

the rule of pro rata distribution, but complaint is made that the rule of the appellee, as stated by Mr. Wigton, was violated, in not applying it to the cars covered by the rule. This is an action to enforce the rule as established.

The statement of claim in this case was filed on the 17th day of July, 1908. Prior thereto the Interstate Commerce Commission had held that private or individual cars and foreign railway fuel cars, should, in the distribution of cars, be counted as a part of the equipment for distribution against the company to which such cars were delivered:

> Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C. Rep. 398.

and, therefore, such cars were a part of "the equipment for distribution" on the percentage basis established by the rule of the Pennsylvania Railroad Company, and the failure of the Pennsylvania Railroad Company to count such cars upon its percentage basis of distribution, was a violation, so far as the Morrisdale Coal Company was concerned, of the rule established by the Railroad Company, for the daily pro rata distribution of its cars.

Prior to the filing of the statement of claim in this case, the Interstate Commerce Commission also held that cars of a carrier upon its own line for transportation of its own necessary fuel supply, should be counted against the mines receiving the same under daily percentage distribution, if the mines receiving such cars were engaged in the shipping also of commercial coal.

> Traer vs. Chicago & Alton Ry. Co., 13 I. C. C. Rep. 451.

This view was approved by the Supreme Court of

the United States in the case of *Interstate Commerce Commission vs. Chicago & Alton Ry. Co.*, 215 U. S. 479.

And see also,

Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S. 452.

Therefore the cases decided by the Interstate Commerce Commission prior to the filing of the statement of claim in this case, are conclusive that the arbitrary elimination of private or individual cars, fuel cars and foreign railway fuel cars, by the Pennsylvania Railroad Company in its daily pro rata distribution under the rule established by it for the purpose of providing "a just and equal distribution" of cars, was a violation of the rule established by the Pennsylvania Railroad Company, so far as the Morrisdale Coal Company was concerned, and this was the cause of action asserted by the Morrisdale Coal Company.

What good was to be accomplished, or what confusion avoided by again having the Commission determine that "the equipment for distribution" under the rule of Pennsylvania Railroad Company above set forth, covered individual cars, foreign fuel cars and the company's fuel cars?

The case presented by this record was not one in which was involved the reasonableness or unreasonableness, the fairness or unfairness, of a rule of distribution of cars established by the Pennsylvania Railroad Company, for its rule provided that "the equipment for distribution" should be daily pro rated to the mines in accordance with the percentages established by the Pennsylvania Railroad Company, and the complaint here is that, so far as the Morrisdale Coal Company was concerned, this rule was violated by the Pennsylvania Railroad Company, during the period covered by this complaint, by arbitrarily assigning a

part of the cars which should have been counted in the distribution, during the period covered by this complaint, to the Berwind-White Coal Mining Company (See Record, pp. 63-64).

The complaint, therefore, in this case is not covered by the decision of this court in the Pitcairn Coal Company case, for there a charge was made that the then present rules of distribution of cars were unjust and unreasonable and discriminatory, and the court was asked by mandamus to prescribe a reasonable and fair method of distribution for the future, and the court held that the question there presented as to the fairness of the established rules, must primarily be passed upon by the Interstate Commerce Commission, but here no attack is made upon the rule for distribution as established by the Pennsylvania Railroad Company, but it is charged that in the past and during the period covered by the complaint, the Pennsylvania Railroad Company had violated, so far as the rights of plaintiff were concerned, the rule of distribution established by it.

Nor is the complaint here covered by the Abilene Cotton Oil Company case, where the Court held that the lower court had no jurisdiction to entertain a complaint charging that a rate duly filed with the Interstate Commerce Commission, was unjust and unreasonable until the complainant had first applied to the Interstate Commerce Commission, and on the ground that if the Court assumed jurisdiction of such a complaint, that confusion would be brought about and the purposes of the Act destroyed in that the administrative duties of the Interstate Commerce Commission would be interfered with. If in that case, however, the complaint had been that the carrier company had established and filed with the Interstate Commerce Com-

mission a rate of $1.00 per ton on coal, and that during a period prior the complaint, the carrier had charged the complaining shipper $1.50 per ton on coal, or fifty cents above the tariff rate, thereby violating its tariff, we submit that the Abilene Cotton Oil Company case does not go to the extent of holding that the Court would not have had jurisdiction to entertain the claim for the fifty cents charged in excess of the tariff rate during a period prior to the filing of the complaint.

II.

There is another view of this question of jurisdiction which clearly sustains the position of the appellant even if it be assumed that the appellant's attitude originally was an attack upon the fairness or reasonableness of a rule, regulation or practice of the Pennsylvania Railroad Company by a claim for damages therefor.

The decision of this Court on the question of jurisdiction as discussed in the Pitcairn Coal Company case and the Abilene Cotton Oil Company case, obviously refers only to attacks made on present, existing regulations or practices or present, existing rates.

Section 9 of the Act to Regulate Commerce, under which this action is brought, is as follows:

> "Sec. 9. That any person or persons *claiming to be damaged by any common carrier subject to the provisions of this act* may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may *be liable under the provisions of this act,* in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each

case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

It is argued by the appellee here that the decision of the United States Supreme Court in the Abilene Cotton Company case, 204 U. S. 426, and in the Pitcairn case (*supra*), determine that the United States Circuit Court had no jurisdiction to entertain an action for damages on the part of the appellant, for failure to give to the appellant its fair proportion of cars, until the appellant has proceeded before the Interstate Commerce Commission and secured from that tribunal a ruling to the effect that the "regulations and practices" of the appellee with respect to such car distribution constitute "undue and unreasonable prejudice or disadvantage", and are "unjust and unreasonable, or unjustly discriminatory or prejudicial" or otherwise in violation of the Act to Regulate Commerce; and that in the absence of such finding by the Interstate Commerce Commission, the Circuit Court had no jurisdiction under the authority of the two cases above mentioned.

We reply to this position of the appellee, first, that under the circumstances of this case, *the Interstate*

Commerce Commission would only have concurrent jurisdiction with the courts to entertain the complaint as to the regulations and practices as to car distribution which were in effect on the Pennsylvania Railroad at the time covered by the complaint in this case, and that one of the forums to which the appellant could originally go and seek relief was the Circuit Court of the United States, under Section 9 of the Act to Regulate Commerce. The confusion which would arise, as illlustrated in the Pitcairn Coal Co. case, could only exist, when concurrent jurisdiction is assumed by the Commission and the Circuit Courts in the consideration of *present* regulations and practices of the carrier which do now and will in future create discrimination. We hereinafter discuss this fully.

It will be seen that the reason upon which the Court reached the conclusion that the Commission and the Courts could not have concurrent jurisdiction of the question of the reasonableness of the rates published and filed with the Commission, as required by Section 6 of the Act to Regulate Commerce, is that such rates might be found reasonable by the Court and unreasonable by the Commission, and *vice versa*, and that this would produce a conflict between the Courts and the Commission, and the enforcement of the Act to Regulate Commerce would be impossible. And therefore, taking the Act as a whole, the Supreme Court held, as will be hereafter seen, that the right to sue in the courts under Section 9 of the Act to Regulate Commerce was limited to only such cases *as would not produce confusion and conflict as between the conclusions reached by the Commission and the Courts.*

We conclude that the principle has been established that Section 9 permits suit to be brought for damages thereunder wherever the conclusion

reached by the Court does not operate as to the future regulations and practices to be observed by the carrier, and where there can be no conflict between the conclusion which may be reached even in the exercise of concurrent jurisdiction by the Commission and the Courts under the Act to Regulate Commerce.

This view is further borne out by the opinion of the Supreme Court in the Abilene Cotton Oil Co. case (*supra*) p. 445):

> "In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, *its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all.* And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before

its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing the equality which the statute commands." (Italics ours.)

It will be observed that in both the Pitcairn Coal Co. case and the Abilene Cotton Oil Co. case, above set forth, the jurisdiction of the courts was denied on the ground that the exercise of the jurisdiction by the courts required prescribing a rule of action *for the future,* and that this course would necessarily result in conflict and confusion, as between the courts and the Commission, to which the Act to Regulate Commerce had primarily committed the duty of enforcing reasonable and just rates, rules and practices to be thereafter observed by the carrier.

Coming now to the case before this Court, it will be observed that the practices complained of and which damaged the appellant, were in effect on the Pennsylvania Railroad from 1902 to January 1, 1906; and the appellant's claim covers a period from 1902 to the latter part of 1905.

On the first of January, 1906, the appellee, the Pennsylvania Railroad Company, annulled the practices which had theretofore been in effect and which are complained of in this suit, and established a different rule for the distribution of cars. (See evidence of Wigton, Record, p. 57.) And our position in this case is, that the rule or practice complained of having been annulled on the first of January, 1906, that the exercise of jurisdiction by the court in passing upon the fairness of the past rule or practice could not produce confusion, nor could the Commission be in any way embarrassed by the Circuit Court of the United States exer-

cising concurrent jurisdiction with the Interstate Commerce Commission, under Section 9 of the Act to Regulate Commerce, to pass upon those rules or practices, and awarding damages on account of the discriminatory character of them.

The fact that our construction of the Act to Regulate Commerce permits the exercise of concurrent jurisdiction by the Commission and the Courts, is no argument against such construction, if that construction defines the true meaning of the Act. Nor is it any argument against the proposition which we advance, to say that different conclusions might be reached by the Commission and the Courts upon cases identical in their facts. This has been true of all litigation, especially in those cases where there is concurrent jurisdiction in the State and Federal courts; similar cases have been decided in different ways by different courts continually, and will continue to be so decided. Where, however, as would be the case under our construction of the Act, the Federal courts have jurisdiction concurrent with the Commission, to determine the reasonableness or unreasonableness of past rules and regulations of traffic, which are now obsolete, and assess damages thereon, precedent, which has always governed the courts, would tend to preserve uniformity. In any event, no confusion could arise destructive of the provisions of the Act to Regulate Commerce, such as would arise should the Federal courts determine in the first instance the reasonableness of present or future regulations and practices, and the final adjudication of the case would come to this court, whether begun originally before the Commission or in the Circuit Court.

III.

In the case of Railroad Commission of Ohio vs. Hocking Valley R. R. Co. (12 I. C. Rep. 398), the

same questions, as to distribution of cars, involved in the present case, were decided by the Interstate Commerce Commission. The decision of that case was rendered on July 11, 1907, after suit had been begun by the Pitcairn Coal Company vs. the Baltimore & Ohio Railroad Company, but before suit had been begun in the present case. The question then before the Commission was the same question of car distribution concerning individual cars, foreign railway fuel cars and railway fuel cars, and the Commission then decided:

> "That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such 'private' and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of 'private' and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars."

This decision was afterwards affirmed by the Commission in Royal Coal & Coke Company vs. Southern Railway Co., 13 I. C. Rep. 440; Traer, Receiver vs. Chicago & Alton R. R. Co., 13 I. C. Rep. 451; and Rail & River Coal Co. vs. Baltimore & Ohio R. R. Co., 14 I. C. C. Rep. 86. This rule is in substance the one contended for by the appellant here and is the same

as the one originally established, as shown by the testimony of F. H. Wigton in this case (Record, p. 12), and violated by the Pennsylvania Railroad, as shown in this case, there being no evidence to show that the private or individual cars were in such quantity that the placing of them at the mines to which they belonged would have given to the mines receiving the same a greater number of cars than such mines were entitled to under their percentages, during the periods of car shortage. It would be doing a vain thing to ask the Commission to pass upon a similar question before invoking the jurisdiction of the Circuit Court. It cannot be contended that the rulings of the United States Supreme Court are to the effect that where the Commission has once passed upon a question, and established a proper regulation, that all subsequent complaints involving identically the same condition of affairs, and the construction of the same regulations must first be presented to the Commission, in order that the Commission may again reiterate its rulings. Having once established a rule, it is submitted that all plaintiffs thereafter are fully justified in proceeding on the strength of that rule in the Circuit Court of the United States.

Claim is made here that the ruling of the Interstate Commerce Commission requires the delivery to a coal company of all its individual cars and specially consigned cars, even though the delivery of such cars to such company would result in its receiving more cars than it would be entitled to under its percentage. And it is further argued that the appellant having failed to show that it could have received the number of cars that it was entitled to under its percentage, if the individual cars and specially consigned cars had

been given to the persons entitled to the same, that the appellant had failed in its proof and judgment must go for the appellee.

When we show by the distribution sheets of the appellee, *the number of cars on the road available for shipment of coal,* and the number thereof to which the appellant would have been entitled under its percentage, then the appellant has proven its case; and if the number of cars to which the appellant was entitled is to be reduced by reason of any exception on account of the particular character of certain cars on the road available for carrying coal, then the burden is upon the appellee to show the number and character of such cars in order to exclude them from the general rule as to distribution. The appellee has utterly failed in this case to sustain this burden. It is true that it was shown in the evidence that some of the cars were individual cars and some were also specially consigned cars, but this does not establish that the appellant would not have received its full number of cars under its percentage, even if such cars had been given to the persons entitled thereto, as claimed by the appellee.

If the appellee relies upon the fact that a certain number of cars were of special character and therefore to be taken out of the general distribution, we submit, that the burden is upon it to show the number of such cars; and the proof being insufficient to establish the number of such cars, the appellant cannot be defeated on this ground.

IV.

Even if this Court should determine that an application to the Interstate Commerce Commission is necessary, it is submitted that the proper practice in the present case would be for the Court to suspend

further proceedings herein, to permit the appellant to make an application to the Interstate Commerce Commission for a ruling upon the reasonableness of the methods of distribution of the appellee carrier which the appellant now seeks to attack. Such a proceeding was permitted in the case of Southern Railway Company vs. Tift, 206 U. S. 428, a case which was decided after the decision in the Abilene Cotton Oil Company's case, and was a bill filed to restrain the railway company from maintaining certain rates. Temporary injunction was at first granted, but was subsequently dissolved, and the complainants were permitted to make application to the Interstate Commerce Commission for the purpose of determining the reasonableness of the rates attacked. The finding of the Commission was had, and the action of the Commission incorporated into the case before the Circuit Court. A situation comparatively similar arose in the case of the Northern Pacific Railway Co. v. The Pacific Coast Lumber Mfg. Assn., 165 Fed. Rep. 1.

This method of procedure will appeal the more strongly to the equities of the present situation, when it is realized that the Statute of Limitations has now run for all of the appellant's damage, and should the present suit be dismissed and the appellant relegated to a determination before the Interstate Commerce Commission followed by a suit for damages on such determination, the Statute will unquestionably be interposed as a bar despite the fact that under the decisions of the Supreme Court in the case of Interstate Commerce Commission vs. Illinois Central Railway Co., 215 U. S. 452, the discrimination by the carrier is obvious, and the appellant's damages, the result of such discrimination, equally so.

C. On the distribution of the cars.

The question between the appellant and appellee on this point is, that the appellant contends that all cars in the region available for shipment of coal, whether individual, railroad fuel, or commercial cars, shall be taken as the number upon which the percentage to which the appellant is entitled, and shall be estimated in the daily distribution, in other words the rule of the appellee that each mine's percentage should be applied to "the equipment for distribution" (Record, p. 12) meant, and could under the law only mean, all cars daily in the District for transportation of coal and for loading by mine owners.

The appellee contends that no discrimination results when the total number of cars to be counted in such distribution, is limited to cars in the region, after deducting the individual cars, the fuel cars, and the foreign railway fuel cars.

This action was brought under the Act of Congress of February 4, 1887, entitled "AN ACT TO REGULATE COMMERCE", and its amendments and supplements, and charges the appellee company with a violation of Section 3 of that Act, which reads as follows:

> "SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is conceded by the appellant that if individual cars, fuel cars and foreign railway fuel cars are not to

be counted in the distribution against the person receiving the same, there has been no undue or unreasonable discrimination against it (Record, p. 64); consequently the first question for determination is whether or not the method adopted by the appellant in calculating the amount of cars due it by the railroad company was proper in law. This whole question was thoroughly and exhaustively examined by the Circuit Court of Appeals of the Fourth Circuit in the case of United States of America, ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio Railroad Company, 165 Fed. Rep. 113, and the question was squarely decided in favor of the appellant's contention.

On the question of individual cars the court speaks as follows:

> "The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their investment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. This is a matter which we cannot consider, inasmuch as the statute was not enacted for the purpose of promoting the interests of any particular mine owner; it being limited to one purpose, to wit, the fair and equal distribution of car service by railroads or transportation companies among all mine owners similarly situated within the territory in which their lines are operated.
>
> "It is made the duty of the carrier to move the product of the shipper, and in doing so, if the carrier should by any means deny to a particular shipper his just and proportionate share of facilities as compared with other shippers similarly situated, then, in that event, the shipper would undoubtedly be entitled to the relief afforded by Section 23 of the act. If, as in this instance, a carrier by contractual arrangement, operates individ-

ual cars belonging to mine owners as a part of its equipment, such arrangement cannot in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. There is nothing in the interstate commerce act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a matter which is left entirely with the carrier; but, while such is the case, it is equally true that the carrier cannot, by any such arrangement, by indirection, accomplish that which is prohibited by the statute.

"We do not think it was the purpose of the framers of the act to undertake to secure the same development of each mine, but rather to place the various shippers upon an equal footing in so far as shipping facilities were concerned. To any one who is acquainted with the coal business it will be readily seen that, under any system of car distribution which places a particular mine owner in a position where such owner is unable to make prompt delivery of the product of his mine, such failure on the part of the shipper to receive his proportionate share of cars must necessarily result in placing him at a great disadvantage and in a position where it would be practically impossible to operate his mine, and all this to the very great injury of the consumer, who, under such conditions, is from necessity compelled to purchase from the favored shipper, at higher prices, or, at least, with suppressed competition, because the favored shipper can alone, under such conditions,

guarantee and secure to him steady and uniform shipments of fuel absolutely necessary, in most cases, for the successful conduct of his business."

On the question of fuel cars the Court, in the same case, expressed itself as follows (page 126):

> "The court below, in dealing with the question relative to the fuel cars of the Baltimore & Ohio Railroad Company and foreign railroad cars, held that they were not to be charged against the companies using them as a part of the percentage to which they were entitled under the arrangement agreed upon, to which reference has heretofore been made. A careful consideration of this phase of the question forces us to the conclusion that the fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel, and the private or individual cars of the mining operators should be placed absolutely upon the same basis in so far as the distribution of car service by the carrier is concerned. We fail to understand upon what theory the carrier can relieve itself from a charge of discrimination, when it is shown that such cars are arbitrarily allotted to certain mines, and not charged to such mines as a part of the percentage to which they are entitled under the arrangement by which it is undertaken to secure a fair distribution of car service among shippers on its line."

The Court then quotes with approval the cases of The Railroad Commission of Ohio vs. Hocking Valley R. R. Co., 12 I. C. Rep. 398; Logan Coal Company vs. Pennsylvania Railroad Company, 154 Fed. Rep. 497, which we have subsequently quoted in this brief.

The rule laid down by the Interstate Commerce Commission in the Hocking Valley case was affirmed by the Commission in the case of Traer vs. Illinois Central R. R. Co., 13 I. C. Rep. 451. The Railroad Com-

pany appealed from the ruling of the Commission to the United States Circuit Court, which modified the Commission's ruling in part. From this an appeal was taken by the Commission to the United States Supreme Court, which reversed the ruling of the Circuit Court and sustained the regulation of the Commission. Interstate Commerce Commission vs. Illinois Central R. R. Co. (215 U. S. 452).

This case merely follows the trend of decisions as laid down in all previous cases. The rule upon the subject is well stated in Riddle, Dean & Company vs. Pittsburgh & L. E. R. Company, 1 Int. Com. Comm., Rep. 374, 386, as follows:

> "If, in that crisis, it could not furnish sufficient cars to all the shippers along its line for the amount of their freight, then it was its duty to have done what is shown by the evidence it did, and this was to fairly endeavor to furnish its cars to shippers of coal in proportion to their shipments over its line upon a basis that was relatively and substantially just."

The rule was expressly recognized in U. S. vs. W. Va. Nor. R. R. Co., 125 Fed. 252; U. S. ex. rel. Coffman, vs. Norfolk & Western Railway Co., 109 Fed. Rep. 831. So also in Indian Mtn. &c. Coal Co. vs. Ice Co., 134 N. C. 574, it was said (page 583):

> "In the latter case (referring to the Coffman case, 109 Fed. 831, which had just been cited with approval), it was held that while the capacity of a shipper of coal may be greater than his allotment of cars, yet when such is also the case with any other operator similarly situated in the coal field, it is the duty of the railroad company, when the supply of coal cars is short, to prorate the supply on hand without unjust discrimination, among all the operators, including the shipper in question."

The argument of the Pennsylvania Railroad Company (appellee) is that when short of cars it prorates what it calls the commercial cars upon its line; but these cars are not the entire number of cars upon its line, but a number left after arbitrarily taking out of the distribution a large part of its equipment, to wit, individual fuel cars and foreign railway fuel cars. The extent of this reduction is shown by the evidence (Record, page 77) in which the calculation offered by the carrier company showed that in four years from 1902 to 1905, inclusive, out of 310,085 cars, placed in the region, less than one-third, or 98,652 cars, were what are called by the appellee commercial cars, or Pennsylvania Railroad System cars. That the distribution after the elimination of these cars is not such a prorating of all cars upon the line or "the equipment for distribution" as will meet the requirements of the Interstate Commerce Act has been held in several cases.

Thus, in Rice vs. Louisville & N. R. Co., 1 I. C. C., Rep. 547, it was said by Judge Cooley:

> "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. vs. Pratt, 22 Wall. 123, 133), and then to offer their use to everybody impartially. If the varieties of traffic are such and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot with any justice be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to have rolling stock and then allow

it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic."

This very language is quoted with approval in United States vs. Norfolk & W. Railway Co., 109 Fed. Rep. pages 836-7, where it was said, per Jackson, J.:

"While the capacity of the Indian Ridge mine may have been greater than its allotment of cars, yet that was shown to be the case with every other operation similarly situated in that field. In other words, the supply of coal cars was short, and the railway company simply prorated the supply on hand, without discrimination, among all the operations, the Indian Ridge included, which, under all the authorities, it not only had the right to do, but was compelled to do. Iowa Railroad Commissioners, 1878, p. 20; Riddle vs. Railroad Co., 1 Interstate Com. R. 594. And the railway's duty was not affected in the least by proof that the President of the Indian Ridge Coal and Coke Company offered to furnish the railway company cars to be used exclusively in the transportation of coal from the Indian Ridge mines; First, because these cars were to be purchased of the Indian Ridge by the railway upon the installment plan, the railway thereby becoming interested therein at once, and finally the absolute owner thereof; so that, in the event of an exclusive application of the same to the business of the Indian Ridge mines, there never would have been a time, from first to last, during which the railway company, by such a course, would not have been devoting rolling stock which it owned or was interested in as a common carrier, to the demands of one shipper, to the exclusion of another similarly situated, which it cannot rightfully do. And, secondly, because, even if it never should become interested in, or the owner of, the cars, still it may not rent its track to, or permit them to be appro-

priated by others, to the detriment of other shippers, whom it should serve to the uttermost. Even with such special cars in its service, when the stress of unusual business comes, the special cars would have to be applied to the accommodation of all shippers alike. The substance of the whole thing has heretofore been well expressed by Judge Cooley." (See quotation last above.)

So also in Rice vs. Western N. Y. & Pa. R. Co., 4 Int. Com. Comm. Rep., page 149, it was said:

"There is no force in the fact that the tank shipper furnishes his own tanks. It is not the business of a shipper to furnish the vehicle of transportation. That of the duty of the carrier. Under its franchise the carrier must do more than construct its roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation dues, whether he owns or hires his vehicle." (See also Majestic C. & C. Co. vs. Illinois Cent. R. Co., 162 Fed. 810.)

In Haring-Wilson Coal Co. vs. Wheeling & L. E. R. Co., decided December 22, 1906, before the Railroad Commission of Ohio, somewhat the same facts were presented as in this case, though not as fully, and the court held:

(1). It is the duty of a railroad to equip its roadway with the means of transportation, ve-

hicles as well as motive power, the use of which vehicles must be open to all shippers impartially. If, instead of providing itself with sufficient and suitable cars to transport the freight offered, certain of its customers, even for their own convenience, furnished their own cars, the cars thus provided should be considered part of the available equipment of such railroad.

(2). A common carrier for all transportation purposes, so far as the public is concerned, makes every vehicle its own which it uses or brings upon its road, no matter how acquired; and, it being the duty of the carrier to transport freight for all persons, in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track for any customer for his exclusive use, except upon condition that if such carrier does not provide sufficient and suitable cars to transport the freight of other customers in the order in which its transportation is applied for, such private cars may be used for that purpose.

(3) In every case where there is a system of mine rating, and the supply of coal cars, according to such rating, is not sufficient to meet the immediate requirements of shippers, all cars from whatever source and however acquired, allowed to go upon the track of the carrier and transport coal from mines on its line, must be taken into account and considered in the allotment and distribution of coal cars to shippers. And these duties of the Company cannot be altered by the furnishing of special cars to the carrier to be used exclusively in the transportation of coal for that shipper, whether sold by the shipper to the carrier on the installment plan, or the shipper retains title to the cars. Such shipper cannot, by contract with the carrier, dictate what the rule of allotment shall be, nor by any scheme or device, preclude the carrier from taking into consideration such private cars as a part of its available equipment for allotment and distribution to shippers of coal."

The Railroad Commission of Ohio discusses the question exhaustively, and the conclusion reached will be found by the court to be a very proper solution of the difficulties of car distribution.

See also, Judson on Interstate Commerce, Sections 189, 191 and 193.

After its decision above referred to, the Railroad Commission of Ohio filed a complaint before the Interstate Commerce Commission, upon the hearing of which the very questions presented by the record in this case were exhaustively considered and on the 11th day of July, 1907, in an able opinion by Clark, Commissioner, in the case of Railroad Commission of Ohio et al., vs. The Hocking Valley Railway Company, No. 1008 (12 I. C. C. Rep. 398) the Commission held as follows:

> "Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so called 'private' cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or 'private' cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Com-

plaint alleges unjust discrimination against other coal operators along the lines of defendants, in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or 'private' cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such 'private' and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered, and such company should not be given, in addition to such delivery, a share of the system cars except when the number of 'private' and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars."

So also it was said in Worcester Excursion Car Co. vs. Pennsylvania R. Co., 3 Int. Com. Comm. Rep. 577, page 587:

"Under the rules settled by the Commission in the two cases of Rice and Scofield, *supra*, there is no question whatever of the existence of the power to regulate the rates and methods of the carrier in these cases. It is wholly immaterial to that regulation whether the cars used by the carrier are owned by it or whether the carrier obtains them from others, for the rates must be the same and all shippers must be treated alike in furnishing sufficient cars and facilities by the carrier for

the freight. These rules recognize that for all the purposes of such service, the cars, no matter whether owned by the carrier or obtained by it from others for the carriage of freight, are for all the purposes of regulation, the cars of the carrier in the performance of service over its line. They admit without friction of the same general application to every kind of freight car."

Especial attention is called to the decision in the case of Logan Coal Company vs. The Pennsylvania Railroad Company, 154 Fed., 497, the opinion in which per Holland, J., was handed down July 1, 1907. That case was a petition for mandamus under Section 23 of the Interstate Commerce Act on behalf of the Logan Coal Company, which is engaged in mining and producing bituminous coal on the Pennsylvania Railroad, to require said Railroad Company to furnish it certain cars as arbitraries. It was shown that the Railroad Company failed to provide a supply of cars to the extent demanded, at times, for the transportation of bituminous coal produced along its lines. The relator had purchased, about two years before, 150 coal cars of 100,000 pounds capacity each, for the transportation of coal produced at its mines, to its trade beyond the lines of the State of Pennsylvania. This purchase was made with the knowledge and approval of the Railroad Company, and the cars were placed upon and used on the Railroad Company's lines, for more than two years last past. It appeared that under the law of Pennsylvania the Pennsylvania Railroad Company was obliged to transport merchandise in individual cars when offered by shippers.

On January 1, 1906, the officials of the defendant company put into force and operation the following order:

"Commencing January 1, 1906, assigned cars,

i. e., cars for Pennsylvania Railroad Company fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified lines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

Since the adoption of the order of January 1, 1906, "Pennsylvania Railroad fuel cars", "especially consigned fuel cars", and "individual cars", have been taken into consideration and counted by the Railroad Company in the assignment of cars to the coal mining companies along its route, and these cars have been charged against the capacity of the mines to which they have been assigned and placed, and the owners of individual cars receive a prorated share of the company's cars on a rated capacity, represented by the difference between the full physical rated capacity of such mines and the capacity of the arbitrarily assigned cars received by it. The object of the adoption of this rule, while it is not entirely accomplished, was to place all shippers on an absolute equality, as nearly as possible, and yet not discriminate against individual car owners, or those to whom cars were especially consigned for fuel (154 Fed. 498).

The court (page 503) held that the individual and other cars should be taken into consideration in making the *pro rata* distribution of cars as follows:

> "The relator is not in any sense discriminated against. First, it has the use of its own cars, and its share of company cars upon a basis which gives it a certain advantage over its competitors, and, in addition, it receives a certain compensation from the railroad company for its cars. They are placed

upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment in order that the defendant company may be enabled to treat all shippers the same, and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its lines, upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company."

* * * * * * *

"What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company, or fuel cars of other corporations purchasing coal from the Relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the Relator. This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable *pro rata* to shippers desiring their use along the line, upon a basis giving each equal facilities with the other."

Section 3 of the Act to Regulate Commerce, prohibits undue or unreasonable preference; and the action of the appellee here brought about such a preference. The Railroad Company, by insufficiently equipping its road and reserving to var-

ious shippers their individual cars, the use of which is paid for by the Railroad Company at a wheelage rental, is doing, with regard to facilities, just what in the tank-car cases it was doing in regard to rates. It is giving a preference to one class of shippers, to their undue advantage, and the undue prejudice of other shippers. Every shipper is entitled to full facilities. When the railroad fills in its insufficient equipment with individual cars for the use of which the Railroad Company pays, and which are denied the poorer shipper, and rents its trackage and locomotives to a rival of appellant, who can thereby obtain the best contracts and mine and ship with regularity, the appellant to whom such cars are denied, is the victim of undue and unreasonable prejudice or disadvantage. As was said in Rice vs. Louisville & N. R. Co., 1 Int. Com. Comm. 503, page 548:

> "He has an advantage, arising from his ownership, in being able to control the use, but that circumstance can be no reason for extending to him exceptional consideration which will make the advantage specially oppressive to competitors. It is, on the other hand, a very forcible reason why the carrier should see to it that its patrons who are forced to make use of such facilities as it provides for them shall not find its own want of proper rolling stock made a ground of discrimination against them. On this point the misapprehension of the situation is very apparent in some of the arguments which have been made for the defense. The complainant, it is said, asks the railroad companies to relieve him from the consequences of his own lack of capital to carry on his business to the best advantage. He cannot choose the best method, because that method requires a large outlay in capital. His competitor in business can choose it, and it is for that reason that complainant is driven out of the market. He must blame his want of

capital, it is said, and not the railroad companies, for his failure.

"A statement of the situation differing a little from this will more nearly present the actual facts. The railroad company not having supplied itself with the necessary rolling stock to enable one branch of its traffic to be carried on in the way most advantageous to those who engage in it, suffers parties who have the capital which will enable them to supply the defect to put cars of their own upon the road, for the use of which it pays, and at the same time gives to such parties the exclusive use of what they supply, and also such preferential rates on the merchandise carried for them as will put successful competition quite out of the question. It is not the lack of capital to carry on the business that then proves fatal, but it is the lack of capital, in addition to what is needed in the business, to supply rolling stock to the railroad company for his use."

Exactly the same effect is produced, so far as the independent shipper is concerned, by the arbitrary allotment of cars for fuel coal, whether the coal is for the Pennsylvania Railroad or for other railroads.

We may, however, leave the technical consideration of the language of the statutes and decisions, and turn to the purpose of the Act, which is well known. It was, undeniably, to prohibit such discriminations by carrier companies between shippers, as will enable one to prosper at the expense of another and to restrict the carrier to its proper duties. To this end it requires the furnishing of all transportation facilities and forbids undue or unreasonable discriminations or preferences. And if the plan of the Pennsylvania Railroad Company, with reference to the distribution of cars, be held valid, what becomes of the Act and its object? The carrier desiring to prefer one shipper has only to allow him to bring his own individual cars

upon the line, or make contracts with him for the furnishing of coal to the carrier, and immediately discrimination takes place. The favored shipper's entire output is hurrying regularly to market, while his competitor must cut down production and movement of coal to the limit of a deficient car supply, which cannot even be counted on for regularity. As a necessary consequence the competitor can get no contracts involving a large and constant supply and regularity of shipment, and cannot have his coal moved. These contracts naturally go to the men who can deliver the coal. The protection of the Act is entirely taken away. If the carrier fails to keep up his equipment or to replace worn-out cars, the whole coal traffic is left to those with individual or other arbitrary cars.

Under the percentage system of car distribution, each mine should be entitled to have its *due percentage of tonnage* moved, regardless of the purposes to which the coal is to be applied. And the cars for fuel for the Pennsylvania Railroad and the cars of foreign railroad companies for fuel coal for those roads, should be counted in the percentage system of distribution, as against the mines using the same. As was shown in the evidence, it is just as important to a mine owner to have tonnage moved when the coal is to be used for railroad fuel as for other purposes and there can be no justification of a system which allows one mine to have moved an enormous tonnage, whether for fuel purposes or for any other purpose, and then permits that mine to have its full *pro rata* tonnage moved as against other shippers. The result brought about by this arbitrary allotment of fuel cars is exactly the same as the preference by reason of the use of the individual car. In fact, there is little or no difference between the foreign railroad fuel car and the indi-

vidual car of a shipper. One is the individual car of the consumer, Railway Company, and the other is the individual car of the shipper.

It is sought in this case, as above stated, to make a distinction between cars for so-called "commercial coal"—that is, coal for the ordinary consumers, industrial plants and public service corporations—and cars for "fuel coal", for use of the railway company upon whose line the mines are situated, or for other Railroads, which send their cars to the mines to be loaded. This artificial distinction is not justified by the facts. What proper difference is there, so far as its *commercial aspect* is concerned, between coal sold to an industrial plant or public service corporation along the lines of the Pennsylvania Railroad for use in engines generating power, and coal sold to the Pennsylvania Railroad Company, or the Philadelphia and Reading Railway Company for use in their engines running upon the tracks serving such industrial plant or the power house of a public service corporation? Both classes of coal are sold by the mine as an article of commerce and both are "traffic" within the meaning of that term as used in Section 3 of the Act to Regulate Commerce. Traffic is defined as the "exchange or sale of commodities, the business or employment of buying and selling". Generally coal is sold for both purposes, to be delivered to the purchaser at the mine tipple, and so far as the miner is concerned, he has no more interest in one than in the other after it is dumped over his tipple into cars. It is the duty of the railroad company as a carrier and as part of its public duty, to "provide and furnish" cars for the transportation of both classes of coal, and after it has discharged its duty to "provide and furnish" cars, then its further duty is to transport the

coal, for the industrial plant to the point where consumed, and the coal for its own use is transported to points from which it may conveniently distribute the same to engines on its lines.

It may be urged on behalf of the carrier, that it must have a regular fuel supply in order to discharge its public duty, and operate its railroads. No one will deny this proposition, but it is neither necessary nor lawful in order to secure such fuel, that the carrier should discriminate against or in favor of mines along its line, or otherwise fail to discharge its duty "to provide and furnish" cars for shipment and carriage of coal, or thereafter to discriminate in the transportation thereof.

This practice of not counting cars for fuel coal may be used for the purpose of enabling the carrier to purchase its fuel at less than the market value thereof, *and we can see no interest that the carrier would have in enforcing such an arbitrary distribution of cars other than for this purpose.* As shown by the report of the Interstate Commerce Commission to Congress of January 25, 1907, in the matter of "Discriminations in Coal and Oil", the "result of this (practice) was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal". The mine operator proposes to the Railway Company, "I will give you 25 cents per ton discount on the price of your coal, if you will give me cars in which to ship the same, and not charge them against my percentage". On a car of 50 tons, this would be $12.50, and in effect, the mine operator, in periods of car shortage, would pay to the Railroad Company $12.50 for the use of each car assigned for loading coal for the use of the carrier, and not charged against the number of cars the shipper would get, under the sys-

tem of distribution. In the same report, after full investigation of all the facts, the Commission say:

> "This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same, is unjust and unfair, unless fuel coal is taken from all of the mines on the line of road in the same proportion as the cars are distributed."

It was suggested in the examination of Mr. Wigton, that what the appellant wished was, that the individual cars, the property of other shippers, be given to it, and that such proceeding would be inequitable. This is not the case. The favored companies in this district claimed a right of ownership in certain specified cars; of cars really owned by and paid for by such companies the appellant does not seek to deprive them. They have secured the use of these cars and, so far as they are owned by them and their use does not interfere with appellant's rights, the use thereof by the companies to which they belong, was not here disputed. But the appellee Railroad Company, cannot by means of these or any other contracts deprive the shipper of its right to a *pro rata* share of the cars in use or "the equipment for distribution" upon its lines; and in determining the fair share of the appellant, all the cars upon the line, by whomsoever owned, must be taken into the calculation. To illustrate: If there were an even ten thousand cars upon the line and the A coal company's fair proportion of transportation facilities were one-tenth of all, the A company would be entitled to one thousand cars. And if, of the ten thousand, the A company "owned", or uses, by contract or otherwise, five hundred cars, the A company could be entitled to those five hundred and to five hundred more, making

its *pro rata* share, or one thousand cars. But in no way should the A company secure for itself more than its fair proportion, or one thousand cars.

But, it is said, these private cars are not the cars of the Railroad Company, that they belong to others, and that it was no hardship on appellant that the owners were given their use, and also the use of a *pro rata* of the cars actually owned by the Railroad Company. This is fallacious. These cars must be drawn by the locomotives of the Railroad Company; they occupy its tracks and obstruct its sidings. The employes who operate them are those of the Railroad Company. The motive power which hauls them and the trackage which they occupy cannot but hinder and delay, in the ordinary course of business, the movement of the traffic of other shippers over the line. All these are matters which operate to the disadvantage of competing shippers. See United States vs. Norfolk & W. Ry. Co., 109 Fed. Rep. 831; Scofield vs. Lake Shore & M. S. Ry. Co., 2 Int. Com. Comm. Rep. 90, page 114.

It is the duty of the carrier to furnish the cars and no duty of this kind rests upon the shipper. This was clearly pointed out in Rice vs. Western N. Y. & Pa. R. Co., 4 Int. Com. Comm. Rep., pages 149-150, where it was said:

> "There is no force in the fact that the tank shipper furnishes his own tanks. It is not the business of a shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct its roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors

in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation duties whether he owns or hires his vehicle. * * * * * If the carrier, whose duty it is to furnish vehicles of transportation, cannot afford to do so impartially for all its patrons engaged in like business, the ordinary shipper is likely to be less able to afford it, and cannot be required to perform the carrier's duty. He might as well be asked to furnish motive power as vehicles of carriage. The carrier cannot transfer his own responsibility to the shipper. The duty to furnish impartial transportation cannot be evaded on any pretext. It is fundamental and imperative."

In State vs. Cincinnati, New Orleans, etc., Ry. Co., 47 Ohio St., 130, it was said:

"It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but it is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car. The duty of providing suitable facilities for its customers rests upon the railroad company; and if instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, *yet*

the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for its private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practiced at the will of the railroad company, and the favored shipper."

To hold otherwise would be to crush the small shipper, and give the entire trade to those who can provide cars or to whom the carrier specially assigns part of its equipment. The injustice of such a course by the carrier has been pointed out by the Interstate Commerce Commission in Independent Refiner's Assn'n. vs. Western N. Y. & Pa. R. Co., 5 Int. Com. Comm. Rep. 415, where it is said (p. 433):

> "If it be not the duty of the common carrier to furnish the vehicle of transportation, then his only legal obligation is to transport over his roadbed such vehicles when furnished by others. He could not be compelled to do more, and if he chose to pursue a course, the privilege of transportation of both person and property over his line might be denied to the great mass of the public and limited to the few who were able and found it to their advantage to invest in cars for their own use. It is manifest that in such transportation there would be but a small if any element of *common* carriage; it would be a prostitution of the franchise received from the State and call for its forfeiture."

Even if it was necessary that the individual cars given to companies like the Berwind-White Coal Mining Company should be distributed in part to companies like the appellant in order to avoid discrimination, it is submitted that such distribution would not be unfair, for the reason that if the arbitrary distribution by the appellee company be carried to its logical conclusion and the region filled with the individual cars of various favored shippers, other cars might be totally excluded and the result would be that all mines not possessing individual cars or without capital to buy them would be at a standstill and under this method of distribution not be entitled to a single car. That such a condition very nearly arose in the Tyrone Region on certain occasions is shown by the data offered by the Railroad Company and found on page 78 of the Record, in which, during the months of November and December of 1902 and January and February of 1903, times when the demand for coal was great and the car shortage marked, there appeared in the region, out of 6814 cars placed in November, only 812 cars which were distributed on percentages; and in December, only 733 cars out of 7222; and in January only 559 out of 6747; and in February only 452 out of 6363.

It is obvious, therefore, that it only needed a slight increase in the Clearfield Region of individual cars, or cars carrying fuel for the railroad companies from certain favored mines, to completely eliminate the shipments of persons not enjoying the use of these arbitrarily allotted cars. It is unnecessary to comment on the injustice of such a situation.

D. On the question of damages.

The appellant showed that its mine was well able to supply and ship coal in all the cars to which it would have been entitled by its percentage rating, and in fact upon many more, and this is shown by the fact that during the months when there was little demand for coal and cars were plentiful and when the appellant received an excess of cars, it then loaded and shipped all cars received. In months of stress, when the appellant was given a deficiency of cars and the Berwind-White Coal Mining Company, among others, received an excess, the appellant has calculated the deficiency in tonnage, comparing the number of cars received with the number which it should have received according to the railroad company's rating. This deficiency in tonnage, therefore, represents coal which, if the railroad company had furnished the proper number of cars, the appellant could have mined and shipped. The appellant, as shown by the evidence, had entered into contracts and obligations to deliver coal, which required daily, weekly and monthly deliveries of which it notified the appellee. Consequently it was in a position where it was obliged to meet the obligations on these contracts and to meet them at certain regular specified times. In order to do this it was compelled to purchase coal in the open market for the purpose of supplying the deficiency which was caused by the railroad company's neglect to furnish it with its proper *pro rata* number of cars. The damage to the appellant resulted, therefore, on each ton of coal which it could have mined had the railroad company supplied its proper quota of cars, and would be the difference between the price at which the appellant was obliged to buy that ton of coal in the open market in order to fulfill its obligations, and the cost

of mining that ton of coal had it been permitted to do so by receiving from the railroad company the cars necessary to ship the coal. Accordingly, the appellant has estimated the average price per ton paid by it for coal purchased to fill its obligations and has deducted therefrom the cost per ton of royalty and mining, and multiplied the total ton shortage in each month by this difference.

This is manifestly the only proper measure of damages, since it represents the actual damage caused to the appellant by the appellee's wrongful act; for, had the appellant been unable to fill these contracts by the purchase of coal, the person who contracted with the appellant, would have been permitted to buy coal in the open market at whatever price he could get it and then have sued the appellant for whatever excess of price he was obliged to pay for appellant's breach of its duty.

The right to recover damages in a case of this character is given by Section 8 of the Interstate Commerce Act, and the damages are specified as "the full amount of damages sustained in consequence of any such violation of the provisions of this Act".

The appellee argues that the appellant is not permitted to pick out of the period covered by the statement of claim, certain months in which the appellant received a shortage of cars, but that the appellee is entitled to set off as against this shortage, the excess of cars which the appellant admits it received in the other months. In reply to this it may be stated:

1. That the unit of time of distribution under which the appellee distributed its cars, as shown by its own distribution sheets, was a day. There were varying numbers of cars in the region from day to day,

and in certain cases the percentage which was given to the different mines varies from day to day.

It is true that the appellant, in making up its calculations, has taken a month as the unit, but this is to the appellee's advantage, since in taking the average for a month, the appellee is given the benefit of all days during that month in which it furnished the appellant with an excess of cars. Where the appellee has declared its own unit, to wit, the day, the appellant might justifiably have figured its damages upon that basis. The appellee surely cannot complain if the damages as figured are more advantageous to it than if they were figured upon the daily basis in accordance with the unit adopted by the appellee.

2. Where the appellee is required by law to furnish to the appellant its proper quota of cars in the region, it certainly cannot excuse a failure to do so by an allegation that at another period it furnished an excess of cars, no more than in law it could excuse a tort committed against an individual one week by a benevolent or beneficial act done to the same party in the following week.

The testimony shows that the furnishing of cars irregularly that is, less than the mine's quota in one month, and an excess in the following month—is highly injurious to the business of coal mining (Record page 15). This evidence shows that the effect of the failure to furnish cars regularly is that the operator is unable to determine how much coal he will be able to ship at a certain specified time, and consequently is unable to meet regular recurring obligations which he has contracted for in the shape of daily, weekly or monthly deliveries of coal.

Furthermore, an insufficient and irregular supply of cars prevents the regular working of the colliery, in-

asmuch as certain fixed expenses still continue; pumps have to be kept going constantly to keep the water out of the mines while the mine itself is kept in idleness.

In addition, (Record, page 37) Mr. Wigton testified that it is absolutely essential for the conduct of the mining business that there should be a regular daily supply of cars. And furthermore, the Pennsylvania Railroad Company had knowledge of the existence of the contracts which the appellant had to fill and was therefore charged with the duty of giving to the appellant a regular supply of cars equal to its legal quota. Having this knowledge, it would now be idle for the appellee to appear and state that having given the appellant an excess of cars in certain months it is entitled to set off this excess as against the shortage which was suffered in other months (Record, page 14).

3. It is, however, noticeable, that the only occasions on which the appellant received an excess of cars was when there was no demand for the cars in the region on the part of the other shippers of coal and the price of coal in the market was low; and the occasions on which the appellant received a deficiency of cars were times when there was a scarcity of cars in the region and all shippers were desirous of having them, and when the price of coal was high, notably during the anthracite coal strike of 1902-1903 (Record, pages 13-14-15, 31-32). Under such conditions the appellee would certainly not be entitled to draw any conclusion in its favor from the fact that the months in which an excess of cars was given to appellant, were when the car supply was plentiful and there was no demand in other quarters for the cars themselves. It also serves to emphasize the point heretofore made that this being an action in trespass, there can be noth-

ing in the nature of a set-off, and the argument that the shortage of cars has been more than made good in other months falls to the ground.

It is also not true that the coal which the appellant was unable to ship in a month of shortage was subsequently shipped in the months in which it received an excess of cars; because, the appellant being obliged to fill contracts for deliveries of coal either daily or weekly, could not, upon a shortage of cars, store the could not, after receiving a shortage of cars, store the coal and wait several months and then deliver it, but was compelled to supply it at the time specified in the contract.

4. The argument that the appellant was each month a purchaser of coal and that the surplus of coal which it was able to produce and ship in the months in which it got more cars than its percentage entitled it to, enabled it to reduce correspondingly the amount of coal purchased in these months, is of no force, according to the reasoning already set forth above; but in any event there is no evidence whatever to show that there was any profit to the appellant by reason of these transactions, for it might still have been the case that because of purchasing coal when coal was cheap—as the evidence shows it was in the months when there was a surplus of cars—the price of mining coal might have been substantially equal to the cost of purchasing it in the open market.

Respectfully submitted,

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Appellant.

Philadelphia, Pennsylvania,
January 30th, 1913.

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IN THE

Supreme Court of the United States.

No. 488. October Term, 1911.

MORRISDALE COAL COMPANY,
Plaintiff-in-Error,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF-IN-ERROR.

Counsel for plaintiff-in-error in this case desire to acknowledge the courtesy of this Court in giving them opportunity to present an argument in regard to the suggestion made by the Court that the case should be dismissed because of the manner in which it was brought here. Counsel believe the assignments of error are well founded, and are fully aware of the hardship upon their client, which will ensue upon a dismissal of the case for an irregularity in practice.

The objection pointed out by the Court is, that this case was an action at law, and should have been brought up by writ of error, whereas it comes up by an appeal.

I.

The Statute under which the Review by this Court is sought.

This case is before the Court under Section 6 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals, by virtue of the following provision thereof:

> "In all cases not hereinbefore, in this Section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

The entire record is before the Court, including the Bill of Exceptions in the Circuit Court, the Assignments of Error filed in the Circuit Court of Appeals, the order of that Court transmitting the record to this Court, and the citation, of which the defendant-in-error accepted service and in response to which it appeared without objection and argued the case on the merits.

It is to be noted that under the Act of Congress of March 3, 1891, establishing Circuit Courts of Appeals, Section 4 provides:

> "That no appeal, *whether by writ of error or otherwise*, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, etc."

This Section uses the word "appeal" in a generic sense, and refers to *appeals by writ of error*, which writ is only applicable to common law actions.

By Section 5 of the Act, it is provided:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases, etc."

When Section 6, however, comes to provide for appeals, in the generic sense, from the Circuit Courts of Appeals to the Supreme Court of the United States, the provision is:

> "In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error *or review* of the case by the Supreme Court of the United States, etc.";

and it will be observed that this provision of Section 6 does not follow the language of Section 5, providing for "appeals or writs of error", but adds thereto the words "or review of the case".

It is to be noted that the above provision of Section 6 of the Act of March 3, 1891, assures to plaintiff-in-error in this case "of right an appeal or writ of error *or review* of the case by the Supreme Court of the United States". This procedure is "*of right*". It may be that the technical "appeal" provided for "of right" would be confined to a case in equity, and that the technical "writ of error" would be applicable to a case at law, but there is also given to the plaintiff-in-error "of right", a "*review* of the case by the Supreme Court of the United States".

A "review" is defined to be "a second examination of a matter"; (Bouvier's Law Dictionary, Vol. 2, p. 921).

This *right* is only applicable to cases not "made final" in the Circuit Court of Appeals; and it would seem that the reasonable construction of the words "or

review" would be that Congress intended that if the record was certified and transmitted to the Supreme Court, with the assignments of error, and the parties were present, the Supreme Court should "review" the case, even though it might not be technically before the Court in the form of "an appeal or writ of error", as may be appropriate to the kind of action involved.

It may be suggested that the words "or review" in this Section of the Act, referred to a review on certificate from the Circuit Court of Appeals, or on certiorari from the Supreme Court, but this cannot be true, because the plaintiff-in-error is not entitled "of right" to a certificate from the Circuit Court of Appeals, and the issue of certiorari is discretionary with the Supreme Court, and then is only applicable under this Act to cases "made final in the Circuit Court of Appeals".

We, therefore, submit that the words "or review" in Section 6 of the Act of March 3, 1891, applicable alone to appeals in the generic sense from the Circuit Court of Appeals to the Supreme Court of the United States, was intended to assure to the party complaining "of right" a "review of the case by the Supreme Court of the United States", whether the case was presented in that Court on a technical "appeal or writ of error", and this construction of the Act interferes with no prior adjudication in this Court, for we can find no case where this Court upon this technical ground, has dismissed a case in which the record, with the assignments of error, came up to this Court properly certified from the Circuit Court of Appeals, and where the parties were in Court and not objecting to the form of the appeal. In fact we can find no case from the Circuit Court of Appeals where the question here presented was involved. And this construction of Section 6

of the Act of March 3, 1891, can present no embarrassment in the future, because in the Judicial Code of March 3, 1911 (Section 241), the words "or review of the case by", as applicable to appeals from the Circuit Court of Appeals to the Supreme Court of the United States, are omitted, and the Judicial Code, in conformity with provisions relating to appeals to the Supreme Court from other courts than the Circuit Court of Appeals, now provides:

> "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs."

Therefore, no question can hereafter arise as to the meaning of the words "or review" in the Act of March 3, 1891. The question here presented has never before arisen and can never arise again under this Act.

When the present case came to this Court, the Act of 1891 was in force, and the question here must be governed by its provisions, and if that Act had read: "there shall be of right a review of the case by the Supreme Court of the United States", would it have been possible to hold that if a plaintiff brought a certified record to this Court from the Circuit Court of Appeals, with the assignments of error, and the defendant appeared in response to a citation issued in the name of the Chief Justice of the United States, and without objection argued the case on the merits, the plaintiff's case would be dismissed because he did not present his "right" of "review" by a particular one of the three alternative rights given to him by the Act, namely, "an *appeal* or *writ of error*

or *review* of the case by the Supreme Court of the United States". The reasonable construction of the words "or review", in the Act of March 3, 1891, is, that Congress intended that a party should have the "right" to have this Court pass upon his case, even if there was technical irregularity in bringing the case here on appeal, when it should have been brought by "writ of error", or vice versa; and this view is not impaired, but is strengthened by the last clause of the above provision of Section 6, to wit:

> "But no such appeal shall be taken, or writ of error sued out unless within one year of the entry of the order, judgment or decree sought to be reviewed."

This clause limits the time within which a case may be brought to this Court, whether by writ of error or appeal, but once there, though irregularly brought, the right of review attaches, and the clause does not purport to limit the previous "right" given to a "review".

Prior to the Act of Congress of March 3rd, 1891, some of the States had, by statute, provision for "a review" of cases by the appellate courts, which was in addition to the usual practice by appeal or writ of error, and this writ of review, which was nothing more than a citation, (Revised Statutes of Massachusetts 1836, Ch. 99, p. 602, Section 3), was frequently used to protect litigants who made technical mistakes in suing out writs of error or in securing appeals.

Hutchinson vs. Gurley, 8 Allen 23, (1864):

By misunderstanding or mistake, no appeal was taken. A review was granted.

Champion vs. Brooks, 9 Mass. 228 (1812):

A writ of error was sued out when there should have been an appeal. Held, a writ of review would lie on application.

Petersham vs Dana, 12 Mass. 429 (1815):

Judge failed to seal bill of exceptions and Clerk failed to enter it of record. A review was granted.

Bowditch Ins. Co. vs. Winslow, 3 Gray 415 (1855):

Plaintiff-in-error did not enter exceptions in Supreme Court as required by law. A review was granted.

It is entirely reasonable to conclude that by the words "or review" in the Act of March 3rd, 1891, Congress had in view and intended that, *when a case had been regularly brought to the Circuit Court of Appeals by "appeal or writ of error",* and the case was not made final in the Circuit Court of Appeals, the parties should "of right" have "a review of the case by the Supreme Court of the United States", when the record and parties were in that Court, even though there may have been technical inaccuracy in the method of bringing the case to the Supreme Court.

II.

The question here presented is one of Practice and not of Jurisdiction in the sense of Power.

The above construction of the Act of 1891 is in accord with the views of this Court in providing for the determination by the lower courts of the real justice of a cause, without applying the technical rules which distinguish proceedings in equity from those at law. These views of the Supreme Court are expressed in the recent Rules of Practice for Courts of Equity of the United States, and have the cordial support of the bar all over this country, and of the people.

If this case had been presented by Bill in Equity filed in the District Court of the United States, and a subpoena had issued under the equity practice, although the subject matter of the action was

only cognizable by a court of law, when in fact, all the pleadings presented a case in equity, this Court would not permit the District Court to dismiss the proceeding, but, under the rules of practice for the courts of equity recently promulgated by this Court, the cause would be transferred to the law side of the Court, and the pleadings altered to conform to the practice in a proceeding at law, so far as necessary.

Rule 22 of the Rules of Practice for the courts of Equity of the United States, is as follows:

> "22. Action at Law Erroneously Begun as Suit in Equity.—Transfer.—If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

This rule was promulgated in the interest of justice, and does not permit the District Court to dismiss a cause on the suggested technical ground as to the form of pleading. The rule confers no jurisdiction upon the District Court on the law side which it did not have before, for the jurisdiction of the court could only be created by Congressional action, and this Court, under its authority to promulgate rules, could not enlarge the jurisdiction of the District Court, and therefore, it could hardly be said that the District Court on the law side did not have jurisdiction, in the sense that it had no right to entertain the case before the rule was promulgated, and by like reasoning, it can hardly be said that the Supreme Court would not have jurisdiction to determine the merits of a cause at law which may have been presented to it in pleadings applicable to a case in equity.

If it should be suggested that the Supreme Court has no jurisdiction, in the sense that it has no right to review an action at law brought to it by process applicable to an equity case, because at the time the Court's appellate jurisdiction was created an action at law must be brought to this Court by "writ of error", and an equity suit by "appeal", we answer that this reasoning is no more applicable to the Supreme Court than it would be to the Circuit Courts under the Act of March 3rd, 1875, c. 137, Sec. 1, (U. S. Compiled Statutes, Vol. 1, p. 507), by which the Circuit Courts of the United States are given jurisdiction "of all suits of a civil nature at common law or in equity", and when the Circuit Courts were created, an equity suit could be brought only by Bill in Equity, with a subpoena requiring an answer to the bill, and an action at law by filing a declaration with a writ requiring the defendant to appear and demur or plead to the action of trespass, covenant, etc., as the case might be. It can hardly be said that the Circuit Courts had no jurisdiction in the sense of no power to entertain a cause of action at law which was presented to it by Bill in Equity, for the Circuit Courts are now required, by Rules of Practice for the Courts of Equity (No. 22), to "proceed with" such case, and if the Circuit Courts had no jurisdiction the Rules established by this Court could not enlarge the jurisdiction. *In re Kirkland*, 14 Fed. Cas. No. 7842; *New England Ins. Co. vs. Detroit &c.*, 18 Fed. Cas. No. 10,154.

Our view is that requiring the District Courts to consider an action at law which may have been presented by Bill in Equity, was a regulation of practice in the District Courts which the Supreme Court might prescribe under Section 917 of the Revised Statutes, and did not enlarge the jurisdiction of the District Courts.

By like reasoning, if this Court heard a case at law brought to it by appeal, it would not be enlarging its jurisdiction, but would be waiving without objection of the parties the practice which regularly should prevail, but which this Court has frequently disregarded when the parties were in Court and no objection was made. *Babbit v. Clarke,* 103 U. S. 606.

The record properly certified with the assignments of error, is before this Court; the defendant is in court in response to a citation issuing in the name of the Chief Justice of the United States, has made no objection and has argued the case on the merits.

It seems to counsel that it would be a great hardship upon the plaintiff-in-error if this case were dismissed for want of a writ of error, when the real purpose of such writ was accomplished when the record was filed. In other words, that which the writ would require has been done, and the parties are before the Court, the plaintiff-in-error asking for its right to a review of the case without objection from the defendant-in-error.

In fact, this Court, as we will hereafter show, has exercised the right of passing upon a law case when presented to it by an "appeal", and which, under the strict rules of the common law, should have been presented by "writ of error". We, therefore, submit that this Court should not dismiss the present case because it was brought by appeal instead of by writ of error, but should now enforce the same rule for guidance in the determination of this question, which it has prescribed as the rule of practice to govern the District Courts where irregularity similar to that here presented occurs; and it is further submitted that the Court, if necessary, should direct that the process upon which the case is brought to this Court, be altered "as shall

be essential" to enable the Court to pass upon the justice of the complaint presented by the record.

Everything essential to enable the Court to pass upon the questions involved in this case is before it, as fully as if a writ of error had been sued out.

A transcript of the record, proceedings and papers upon which the Circuit Court of Appeals acted, duly authenticated, has been sent to, and is now on file in this Court, under order of the Circuit Court of Appeals entered on the 11th day of January, 1911, (Record, p. 125). The Assignments of Error which would have come up from the Circuit Court of Appeals with a writ of error, are here, certified by the Clerk of the Circuit Court of Appeals (Record, p. 127). A bond was filed, which, while it is called an appeal bond, is evidently for the same purpose as if the bond had been given upon a writ of error (Record, p. 125). A petition was filed asking that the transcript of record be sent to this Court for its review (Record, p. 124). A citation was issued running in the name of the Honorable Chief Justice of the United States, upon which the defendant-in-error accepted service (Record, p. 126), and the Pennsylvania Railroad Company is present in court without objection, to show cause why the action of the Circuit Court of Appeals should not be corrected "and speedy justice should not be done to the parties on that behalf" (Record, p. 126). It appears that instead of a writ of error issuing, the Circuit Court of Appeals, allowed "an appeal" for the purpose of reviewing its action. This being the state of the record, the only irregularity suggested, is that the parties, without objection, are before the Court under a process which should be used in an equity case, asking it to administer "speedy justice", whereas they should have been here under a writ issued in a common law case. We, there-

fore, submit to the Court that the harsh penalty which this Court does not permit the District Courts of the United States to enforce in case of mistake analogous to this, should not be applied by this Court to a case involving only an irregularity in bringing a case to this Court for its consideration.

If this were a case in equity which should have come to this Court on appeal, and had come up by writ of error, there might be some difficulty in the way of the Court considering the same, because a writ of error only brings up questions of law, and therefore the writ of error not bringing up questions of fact, the Court might not be able to dispose of the whole case; but this case is in fact a law case and appears to have come up by appeal, which brings up the entire record *upon the law as well as the facts.* Everything is before the Court to enable it to pass upon the questions of law, without passing on the facts. Indeed, only questions of law are raised by the assignments of error in this case.

We cannot think that there is any doubt that this Court *has the right,* where the record is present, and the parties have appeared and argued the case on the merits without objection, to pass upon the questions involved, notwithstanding the record may have been brought to this Court on appeal, when technically it should have been here by writ of error.

The questions presented by this record are important, to the public as well as to plaintiff-in-error, and a decision of this Court thereon is especially important at this time in order to clear away the uncertainty which exists, as to the jurisdiction of the Courts and the Interstate Commerce Commission under the Act to Regulate Commerce; and if within a year after the record came to this Court, this technical question had been raised, we would have had opportunity to

save the rights of our client, which will be absolutely lost if the appeal is dismissed for this irregularity. The time within which to apply for a writ of error, if the case is dismissed, has expired, and the action is barred by limitations.

We feel that if this Court *has the right* to consider this case on the record and pass upon the questions presented, the essential hardship which would occur by dismissal of the case will incline the Court to pass upon the questions presented, which are here before the Court in exactly the form, (except as to the language of the writ), in which they would have been presented on a technically regular writ of error.

III.

This Court has considered and decided cases brought here by appeal which should have been brought by writ of error.

In the case of *Babbitt vs. Clark,* 103 U. S. 606, an action at law was brought in the State Courts of Ohio. On petition the case was removed to the Circuit Court of the United States for the Northern District of Ohio, and upon motion the Circuit Court of the United States remanded the case to the State Courts, and to reverse that action of the Circuit Court, the case was taken to the Supreme Court of the United States *by appeal. The appellee insisted that the Supreme Court had no jurisdiction "because if reviewable at all, this case should have been brought here by writ of error, rather than appeal".* In discussing the question, Mr. Chief Justice Waite, at page 611, says:

> "Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that where the suit was

in equity an appeal should be taken. That is the fair import of the phrase, 'writ of error or appeal as the case may be'. This was a suit at law, and consequently should have been brought up by writ of error. There seems to have been very little attention paid to this distinction heretofore, and we now find that we *have often considered cases on writ of error that ought to have been presented by appeal, and on appeal when the proper form of proceeding would have been by writ of error.* No objection was made, however, at the time, and we did not ourselves notice the irregularity. Without deciding whether we would reverse the order of a Circuit Court if objection were made when the case was brought up in a wrong way, we are not inclined to delay a decision on the merits in this case because of the irregularity which appears, as we think the suit was properly remanded, and the order to that effect should be affirmed." (Italics ours.)

It will be observed in this case that the Court considered the case and affirmed the judgment below, notwithstanding the fact that objection *to the jurisdiction was urged by the appellee.*

In the case of *Gold-Washing & Water Co. vs. Keyes,* 96 U. S. 199, a bill in equity was filed in a State Court of California. A petition was filed to remove the suit to the Circuit Court of the United States for the District of California, and upon motion the Circuit Court remanded the case to the State Courts, and "to obtain a review of this action of the Circuit Court the present writ of error has been brought under the provisions of Section 5 of the Act of 1875, which gives authority for that purpose", and notwithstanding that it appears in the case that the effort was made by writ of error to review the action of the Circuit Court in an equity case, this Court considered the case and affirmed the Court below.

There are, of course, cases in this Court where it was attempted by appeal to review final judgments in cases at law, which were dismissed by the Supreme Court on the ground that the Court could only review a judgment in an action at law on a writ of error; but in every case we have found, where such action was taken by the Supreme Court, either there *was no appearance* in that court by the defendant-in-error, or a motion to dismiss was duly made by the defendant-in-error on the ground that the judgment could not be reviewed except on writ of error.

In the case of *Comstock v. Eagleton,* 196 U. S. 99, an action was brought to recover damages for false imprisonment. A demurrer was sustained and the petition dismissed. The case was taken to the Supreme Court of Oklahoma, and the judgment affirmed, and from the judgment of affirmance an "appeal was allowed and prosecuted to" this Court. The appeal was from the Supreme Court of Oklahoma and was not under the Act of March 3rd, 1891, which allows "of right" a "review" as well as "an appeal or writ of error". It appears from the report of the case that *"there was no appearance or brief for defendant in error",* and thereupon the opinion of the Court was delivered by Mr. Chief Justice Fuller, saying, (page 100):

> "Final judgments of the Circuit Courts of the United States in actions at law can only be revised on writs of error. *Deland v. Platte County,* 155 U. S. 221; *Met. Railroad Company v. District of Columbia,* 195 U. S. 322; *Bevins v. Ramsey,* 11 How. 185; *Sarchet v. United States,* 12 Pet. 143."

An examination of these cases, cited by the Chief Justice, shows that in the case of *Deland v. Platte County,* 155 U. S. 221, an action of assumpsit was

brought in the Circuit Court of the United States for the Western District of Missouri, judgment was entered for the defendant, and motion made "for appeal, which motion was by the Court sustained and appeal allowed." It further appeared that "no writ of error was issued or citation signed, *and no appearance has been entered for the County of Platte*". On this state of the record, Mr. Chief Justice Fuller delivered the opinion of the Court, saying, at page 222:

> "Whatever the course pursued in the courts of the State of Missouri under the statutes of that State in relation to the allowance of appeals, the appellate jurisdiction of this court is regulated by the acts of Congress, and final judgments of the Circuit Court in cases such as this can only be revised on writ of error."

In the case of *Metropolitan Railroad Co. v. District of Columbia,* 195 U. S. 322, it appeared that there was a judgment in an action at law, to review which there was first granted an appeal and then a writ of error issued.

In this case the appellant, or plaintiff-in-error, as it may be, itself raised the question as to whether the case should be presented to this Court on appeal or by writ of error, and filed in the Court of Appeals of the District the following motion:

> "And now comes the appellant by its counsel and shows to the Court that because of the fact that the record in this cause contains what may possibly be considered a bill of exceptions it may be that the proper remedy would be held to be a writ of error instead of an appeal to the Supreme Court of the United States. It therefore prays that this Honorable Court, in addition to the appeal which was granted to it to the Supreme Court of the United States in this cause on the 24th day of October, 1902, it may also be allowed a writ of

error to said Court, and that the supersedeas bond required upon said appeal may also be taken and accepted as a supersedeas bond upon said writ of error."

Upon this motion the writ of error was allowed. In the brief filed for the appellee in the case, it is stated (page 34):

> "The record (page 40) seems to indicate that the case is here by writ of error, but there is no statutory provision for writ of error, and none would lie, for this proceeding was not according to the course of common law."

In delivering the opinion of the Court, Mr. Justice White (page 329) said:

> "Now, as it is settled by the authorities previously referred to that the proceeding in question was legal in its nature and not one of equitable cognizance, and as it has also been settled that the jurisdiction of this Court prior to the Act of 1883, to review the final judgments or decrees of the Supreme Court of the District of Columbia, did not give power to review by appeal, a matter not of equitable cognizance, *Ormsby v. Webb*, 134 U. S. 47, 64, it necessarily follows that we are without jurisdiction to review the action of the Court of Appeals of the District of Columbia on the appeal here taken, and that appeal must, therefore, be dismissed."

The judgment was affirmed on the writ of error.

In the case of *Ormsby v. Webb*, 134 U. S. 47, 64, referred to in the case above cited, an action was brought to determine the competency of the deceased to make a will, and a writ of error was issued to review the final judgment of the Supreme Court of the District of Columbia. The point was made in this Court that the case was one of equitable cognizance,

and could not be reviewed on a writ of error, but only upon appeal, *and a motion to dismiss the writ of error was made by the appellee,* which motion was overruled on the ground that the judgment was in an action at law.

In the case of *Bevins v. Ramsey,* 11 How. 185, cited in Comstock vs. Eagleton (*supra*), the only report of the case is the following sentence:

> "This action at law was dismissed because brought here by appeal instead of writ of error."

In the case of *Sarchet v. United States,* 12 Peters 143, cited by Mr. Chief Justice Fuller in Comstock vs. Eagleton (*supra*), an action was brought in the District Court of the Southern District of New York, upon a bond, for duties charged by the Collector upon certain iron imported into the United States. A judgment was rendered in the District Court against the defendants, and they removed the case by writ of error to the Circuit Court for the Southern District of New York, which affirmed the judgment of the District Court, and the case was then taken to this Court "by appeal from the judgment of the Circuit Court". It appears in the report of the case that *"the Attorney General has moved to dismiss the case for want of jurisdiction in this court, and we think the appeal cannot be sustained."*

So it will be observed that in every case cited by Mr. Chief Justice Fuller in the case of *Comstock vs. Eagleton,* 196 U. S. 99, at page 100, there was either no appearance in the Supreme Court for the defendant-in-error, or appellee, indicating that no proper writ had been served which required appearance, or the defendant-in-error or appellee appeared and moved *to dismiss the case on the ground of the irregularity in the pro-*

ceedings. Not one of these cases was on appeal from the Circuit Court of Appeals, and the Court was not passing on the right to a "review" under the Act of March 3rd, 1891.

In the case of *United States v. Hailey,* 118 U. S. 233, it appeared that the United States was represented in this Court by the Attorney General, *but that there was "no appearance for appellee".* Mr. Chief Justice Waite delivered the opinion of the Court as follows:

> "This case has been docketed here as an appeal from the Supreme Court of the Territory of Idaho, but, on looking into the transcript, we find that the suit was at law and the trial by a jury. Under such circumstances the only proper way of bringing it here for review would have been by writ of error. *Stringfellow v. Cain,* 99 U. S. 610; *United States v. Railroad Co.,* 105 U. S. 263; *Hecht v. Boughton,* 105 U. S. 235; *Woolf v. Hamilton,* 108 U. S. 15. In point of fact, however, *there has been neither a writ of error, nor an appeal, nor a citation, nor an appearance by the defendant or respondent.* It is clear, therefore, we have no jurisdiction, and the case is dismissed." (Italics ours.)

It is to be observed that the Court dismisses the case and calls attention to the fact *that there had been no appearance, and that there was neither a writ of error, nor an appeal, nor a citation,* nor any jurisdictional fact.

In the case of *Hecht v. Boughton,* 105 U. S. 235, Mr. Chief Justice Waite delivered the opinion of the Court, saying:

> "This is a writ of error to the Supreme Court of the Territory of Wyoming to bring up for review the judgment in a suit where there was not a trial by jury. *A motion is now made to dismiss because the case should have been brought here*

> *by appeal and not by writ of error.*" (Italics ours.)

and the motion to dismiss was granted.

In the case of *Armstrong's Foundry*, 6 Wall. 766, at page 769, Mr. Chief Justice Chase, delivering the opinion of the Court, said:

> "The proceedings below related to a seizure of land, and though conducted under the statute in the forms of admiralty, must be regarded as a case of common law jurisdiction, a final decision in which can be reviewed here only on writ of error."

But the Court considered the questions in the case and entered an order reversing the case and remanding the same with directions to allow a new trial.

There are numerous other cases which were dismissed in the Supreme Court, either on motion to dismiss because of improper procedure, or where there was no appearance for the defendant, among them *Parrish v. Ellis*, 16 Peters 376; *Jones v. LaVallette*, 5 Wall. 579. From our examination of the cases in this Court where the question here presented was involved, we have been unable to find any case where this Court has, of its own motion, dismissed a case after appearance by the parties because it was brought by appeal instead of by writ of error; and only in those cases where there was no appearance for the defendant-in-error or appellee, or where there was a motion to dismiss filed, have the cases been dismissed.

In none of the cases above discussed or referred to was the appellate proceeding governed by the Act of March 3, 1891, and many of them were decided before the passage of that Act. We can find no case where the language used in the Act of March 3rd, 1891, is passed upon and we insist that the language therein,

assures to parties, "of right", a "review" of decisions of the Circuit Court of Appeals, which the statutes applicable to other appeals did not in terms give when technically construed.

In all actions *in personam*, personal service of process is a necessary pre-requisite to the jurisdiction of a Court. (*Pennoyer vs. Neff*, 95 U. S. 714.)

We submit that the jurisdictional pre-requisites with reference to the appellate jurisdiction of this Court are, service of citation (or its equivalent by the appearance of the party to be cited, or a waiver by him), and the presence of the record before the Court. The procedure by which the record arrives in the Court, and under which the party appears, is not jurisdictional. Were this otherwise, the orders of reversal or affirmance made by this Court in the cases hereinabove cited, where it has made such orders although the record was before it by an irregular method, would now be void for want of jurisdiction. The erroneous procedure merely confers a right on one of the parties to have the case dismissed on his motion, and if that right is waived, the jurisdiction of this Court is unaffected. But whatever doubt may have existed on the question of jurisdiction prior to the Act of 1891, was completely removed by the insertion in that Act of the right given to the complaining party of "a review" of the case in this Court. This Court has held that "It is the duty of the Court to give effect if possible to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employs". *Montclair vs. Ramsdell*, 107 U. S. 147, 152.

We therefore submit that the application to the case at bar of the word "review", hereinabove contended for, gives a proper value to that word, which would otherwise be ignored. Congress must have in-

serted the word for some purpose, especially as it omitted it in other parts of the Act of 1891, which treat of appeals and writs of error with respect to courts other than the Circuit Courts of Appeals.

In conclusion, it is suggested that inasmuch as the office of a writ of error is to bring to this Court a record in a law case for the purpose of correction of any error of law existing in such record, and inasmuch as the record in a law case is now before the Court, this Court has the power, if deemed essential, to issue a writ of error *nunc pro tunc,* returnable as of the date on which the record in this case was filed. This would be somewhat analogous to the practice in certiorari, where the record is filed with the application for the writ, and upon the granting thereof by stipulation of the parties the record so filed is considered as a return to the writ, and no actual return by the Clerk of the lower court is made. If the Court deems it necessary we now ask that an order be entered directing a writ of error to issue *nunc pro tunc.* This Court has heretofore allowed an appeal bond to be filed *nunc pro tunc*:

Shepherd vs. Pepper, 133 U. S. 626, 644.
Brobst vs. Brobst, 2 Wall. 96.

But we think this is not necessary in view of the argument presented by this Brief.

For all the reasons hereinabove stated, we submit that the case should not be dismissed, but decided on the merits.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Plaintiff-in-Error.

CHARLES L. FRAILEY,
A. S. WORTHINGTON,
Of Counsel.
April 25th, 1913.

FILED.
MAR 17 1913
JAMES H. McKENN
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No. 207. October Term, 1912.

IN THE

SUPREME COURT OF THE UNITED STATES

MORRISDALE COAL COMPANY,
Plaintiff-in-Error,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Brief in Reply on Behalf of the Plaintiff-in-Error.

CHESTER N. FARR, JR.,
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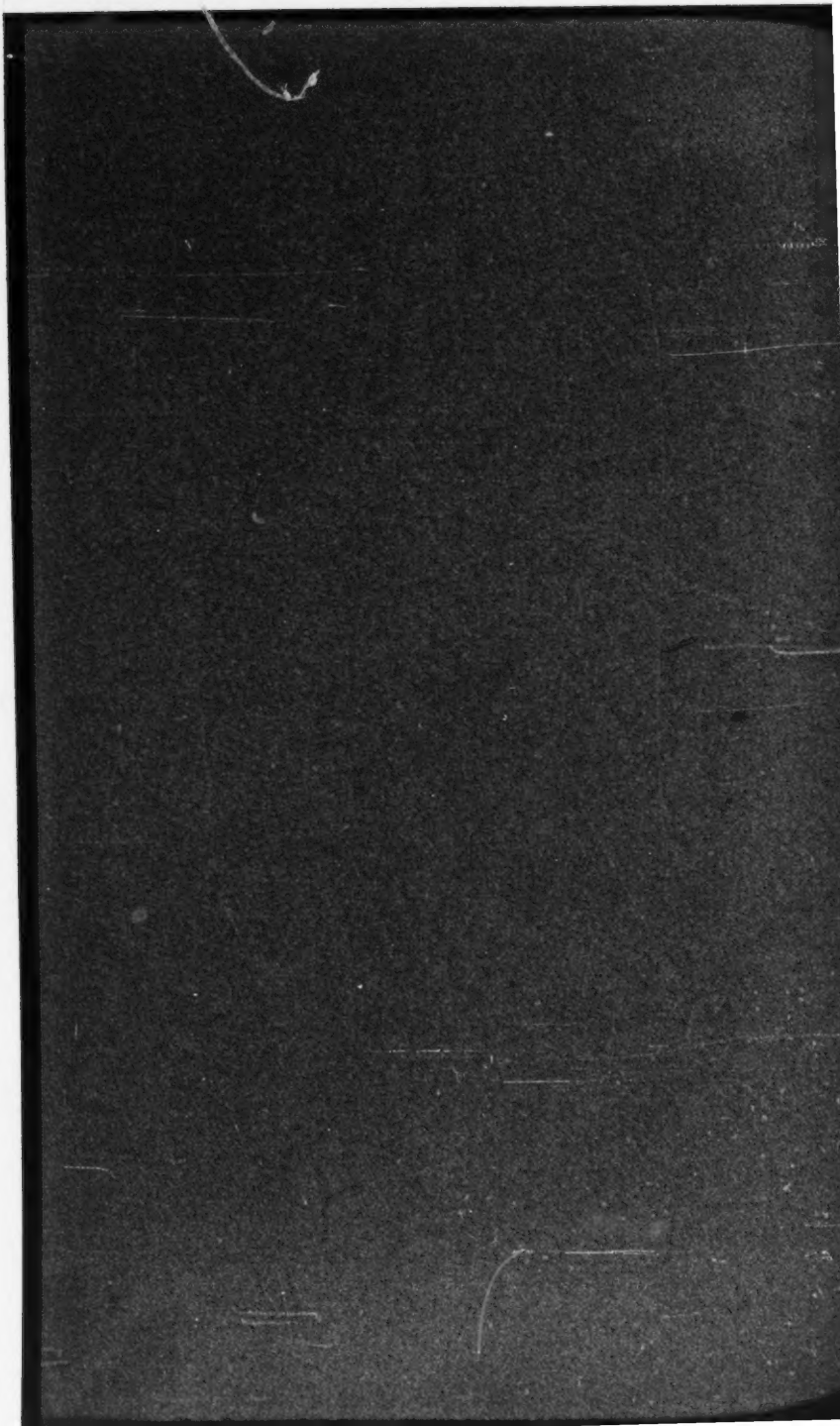
Lawyers' Book Pub. Co., 525 Walnut St.



IN THE

Supreme Court of the United States.

October Term, 1912. No. 207.

MORRISDALE COAL COMPANY,
Plaintiff-in-Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

I. In the Statement of the Case contained in the brief of the Defendant-in-Error, criticism is made of the statement in the brief of the Plaintiff-in-Error to the effect that the rule of car distribution applied by the Defendant-in-Error to the region in which the mine of the Plaintiff-in-Error was situated during the period complained of, was uniformly violated by the Defendant-in-Error; and certain quotations are made from the record for the purpose of substantiating this criticism.

It is to be noted that the contention of the Plaintiff-in-Error is that the Pennsylvania Railroad Company established a rule for car distribution, under which rule they assigned to each of the mines in the territory *a percentage of the equipment for distribution,* based upon the rated capacity of the mine. This is clearly demonstrated by the testimony from the record (p. 13). Having established this rule the Plaintiff-in-Error's complaint is that the Pennsylvania Railroad uniformly violated it.

The quotation cited from pages 57 and 58 of the record is a description of the violation of the rule thus laid down by the Pennsylvania Railroad Company, which violation was uniform. In other words, the Pennsylvania Railroad Company having laid down a rule for the proportionate distribution of the equipment of the road, proceeded arbitrarily to violate such rule by taking out of the calculation such portion of the equipment for distribution as was represented by individual cars, foreign railway fuel cars and company fuel cars, and refusing to allot them under this rule. This is all that the testimony sets forth.

The extract taken from the opinion of the learned trial Judge, (pp. 83, 84 Record) is merely a statement of the method of violation. This is evident from the language of the opinion, as follows:

> "The result was that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class, while the plaintiff received only its ratable proportions of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes."

The statements of counsel quoted from pages 64 and 65 of the Record, are simply a re-statement of the same violation.

The testimony as to the rule in force, and the only testimony in the case as to such rule, is that of the plaintiff himself (Record, p. 13; quoted pp. 47-48, Appellant's paper book), in which he describes the method of rating the capacities of the mines, and proceeds to say that the rule was that each mine was assigned a percentage of the equipment for distribution; *i. e.* the coal-carrying cars in the region—upon the basis of the rated capacity of each mine. The taking of the individual cars, the foreign railway fuel cars, and the Pennsylvania Railroad fuel cars out of this equipment for distribution was therefore a distinct violation of this rule, and it was to this violation that objection was made. This is distinctly the complaint in the Statement of Claim (quoted pp. 45-46, Appellant's brief).

II. On the question whether the appeal from the decision of the District Court should have been taken directly to this Court, the case of Darnell vs. Illinois Central Railroad Company, 225 U. S. 243, cited by the Defendant-in-Error, in its brief, exactly supports the contention which is made here on behalf of the Plaintiff-in-Error. In that case a petition was filed to recover an excess charge over the reasonable rate. A demurrer to this petition was filed by the defendant, and sustained, on the ground that the declaration failed to allege that the plaintiff had made application for reparation to the Interstate Commerce Commission, and that this right to reparation had been sustained by that body. Thereupon the United States Circuit Court filed a certificate to the effect that the cause had been dismissed solely upon the ground of the want of jurisdiction, and a writ of error was taken direct to the Su-

preme Court. This was dismissed by the Supreme Court, stating that the issue so raised did not call into question the jurisdiction of the Court below as a Federal court, and that the question involved was "but the equivalent of saying that the declaration did not state a cause of action because of the failure to allege the existence of a supposed condition precedent to recover in a court of law, namely, a finding by the Interstate Commerce Commission that a right to reparation was possessed by the plaintiff."

The Court went on to say:

> "Under these circumstances it is clear that the question of whether the plaintiff was entitled to relief prayed in the absence of an averment of previous action by the Interstate Commerce Commission involved merely the determination of whether there was a cause of action stated, and hence that under these circumstances this issue did not call in question the jurisdiction of the Court below, as a Federal Court, becomes equally clear when it is considered that exactly the same question concerning the sufficiency of the averments to justify affording relief would have arisen for decision had the suit been pending in a State Court of general authority having jurisdiction over the person. When the controversy comes to be rightly understood, it is obvious that its determination was within the scope of the jurisdiction of the Court below, and that its decision on the issue presented is susceptible of being reviewed in the regular course of judicial proceeding and does not come within the purview of the authority to directly review in certain cases conferred upon this Court by the Act of 1891. *Bache v. Hunt*, 193 U. S. 523; *Fore River Shipbuilding Company v. Hagg*, 219 U. S. 175; *United States v. Congress Construction Company*, 222 U. S. 199."

All this is identical with the case now before the Court. In the present case the action might have been

brought either in the State Court or the United States Circuit Court. The present case on its facts, is absolutely parallel to the case just quoted. In that case the plaintiff demanded damages and failed to set forth in his statement that his right to recover damages had been passed upon by the Interstate Commerce Commission. In the present case, the plaintiff claims damages and the Court below decided that the evidence did not disclose any finding on the part of the Interstate Commerce Commission. One was a demurrer to the statement, the other a demurrer to the evidence. They are in effect the same. It becomes equally apparent that they do not, under the decision of Darnell vs. Illinois Central Railroad Company, involve the jurisdiction of the Court below as a Federal Court. In each case "the failure to allege the existence of a supposed condition precedent to recover in a court of law, viz., a finding of the Interstate Commerce Commission", is absent.

The point decided by the Circuit Court was hardly a question of jurisdiction, but that the plaintiff's evidence was insufficient to show a cause of action. This was the position taken in the appellant's opening brief, page 26, as follows:

> "It was more in the nature of a finding that the plaintiff's evidence did not show that the Interstate Commerce Commission had primarily passed upon the matters involved in the case, than a finding that the Circuit Court of the United States, as a Federal Court, was without jurisdiction."

And this view is in accordance with the opinion of the Supreme Court in the case of *Darnell vs. Illinois Central Railroad Co., supra.*

Respectfully submitted,

CHESTER N. FARR, JR.,
WILLIAM A. GLASGOW, JR.,
for Plaintiff-in-Error.

March 13, 1913.

14

NO. 207 OCTOBER TERM, 1912

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IN THE

Supreme Court of the United States

MORRISDALE COAL COMPANY
Plaintiff in Error

vs.

PENNSYLVANIA RAILROAD COMPANY
Defendant in Error

Appeal from the United States Circuit Court of Appeals for the Third Circuit

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BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

FREDERIC D. McKENNEY
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For Defendant in Error

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IN THE

Supreme Court of the United States

October Term, 1912. No. 207.

MORRISDALE COAL COMPANY

Plaintiff in Error

vs.

PENNSYLVANIA RAILROAD COMPANY.

Defendant in Error

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

STATEMENT OF THE CASE

The plaintiff in error's "Statement of the Case and Questions Involved" requires correction, for it contains material errors or inaccuracies.

It is therein stated that the damages claimed in the action were those "arising from not furnishing plaintiff its proportion of cars for shipment of coal *under the rules established by the appellee and for violation of its rules resulting in unjust discrimination against the appellant.*" Later on it is said that "the rule of car distribution" established by the defendant in error and in force during the period of the action was "uniformly violated" by it with respect to

the plaintiff in error, and the same statement, in effect, though couched in different language, is repeated several times.

All of these statements are incorrect. It was conceded by the plaintiff in error that it had received the cars to which it was entitled under the rule established by the defendant in error and in force during the period of the action, and that if this rule, therefore, was a just and reasonable one, it had no case.

The defendant in error's rule which governed the distribution of its cars among its coal shippers and the basis of plaintiff in error's claim were thus stated by the learned trial Judge in his opinion sustaining the defendant in error's motion to dismiss the case for want of jurisdiction:

> "The railroad company determined the capacity of the various mines in the region by a computation that is not complained of, and thus arrived at the proportion of cars to which the plaintiff and other miners would be entitled when cars were too few to meet the demand completely. This proportion was applied to the deficient car supply in the following manner; Each day the total number of cars available for the whole region was ascertained by the railroad company, and a distribution sheet was then made up, allotting to the plaintiff and the other miners the cars to which the defendant's method of distribution showed them to be entitled. The total available cars consisted of four classes; those that belonged to private individuals or corporations; those that were to be filled with coal that the railroad company had bought for its own use as fuel; those that belonged to foreign railroad companies, and were also to be filled with coal that these companies had bought for their own use as fuel; and system, or company, cars — meaning such cars as did not belong to either of the first three classes but were available

generally for the carriage of coal. If the railroad company had distributed the total number of these four classes ratably among the mines according to capacity the plaintiff would not be now complaining. But a different method was pursued. From the total number of available cars the defendant deducted the aggregate of the first three classes—assigning the private cars to the individuals or corporations who owned them or were entitled to use them and assigning its own fuel cars and the fuel cars of foreign railroads to the mines from which supply was to come—and distributed the fourth class alone in proportion to capacity. The result was that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class while the plaintiff received only its ratable proportion of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes. Averring injury by this method of distribution, and asserting that the total number of the four classes without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination."

(Transcript of Record, pages 83, 84.)

That the rule referred to and summarized in the foregoing extract was that in force during the period of the action was established by the evidence of the President of the plaintiff in error, who on this point testified as follows:

"By MR. GLASGOW:

"Q. Then, under the system which the Pennsylvania Railroad Company had in effect during the period covered by this suit, they did not charge those cars (i. e., individual, and the company's own fuel cars) against the number that the person who had them was entitled to under his percentage?

"A. No. During this period of time they always informed me that those were all eliminated and what was left of their own equipment was divided among the various mines on the pro rata basis.

"Q. Then the foreign railroad fuel cars, cars coming in every day, the Philadelphia and Reading, or the Lehigh Valley—they are used by the Pennsylvania Railroad Company for transporting coal from mines to those railroads?

"A. Yes.

"Q. And they are placed at mines where the foreign railroad, as you call it, has purchased coal, and are shipping that coal, and they are not charged against the number which the party using them is entitled to under his percentage. That is true?

"A. During this period of time they used the foreign railroad cars in precisely the same way that they used the individual cars or their own fuel supply cars, exclusively. They have changed that now.

"Q. They have changed it now?

"A. They have changed that situation.

"Q. They are counted now?

"A. In a manner. In a measure they are counted now.

"Q. The individual cars are now counted in a way?

"A. Yes.

"Q. And the fuel cars?

"A. Yes.

"Q. The railroad company's own fuel cars are counted?

"A. Yes.

"Q. That has been since 1906, has it not?

"A. I think 1906 was the time.

"Q. The railroad company changed the rules so as to count, in a manner—

"A. They did.

"Q. —these cars against the party using them?

"A. They did.

"Q. After taking out these cars which they assigned arbitrarily to these mines using them, and did not count them, then what cars are left they divided on this percentage basis?

"A. They did."

(Transcript of Record, pages 57, 58.)

After the testimony above quoted had been introduced, the following admission was made by counsel for the plaintiff in error:

"We will admit in this case—and I will for Mr. Wigton (*i. e.*, President of plaintiff in error)—that if the cars of individual coal operators are not to be counted in the distribution, but are to be assigned arbitrarily to that operation or to the persons designated by it; if fuel cars for the Pennsylvania Railroad are to be assigned to the party using them, shipping coal for the use of that company, and not count those cars against the percentage to which the man using them is entitled; if the cars of foreign railroads sent into the mines and used by them are to be treated as arbitrary allotment and not counted against the number of cars that the man using them is entitled to under his percentage; then we have no claim here which we can assert, for we think that, after taking out all of

> these arbitrary allotments of cars, that the Pennsylvania Railroad Company has given to us the percentage of this small residue which is left."
>
> (Transcript of Record, page 64.)

And again, later on, counsel for the plaintiff in error, referring to the distribution made to the shipper in whose favor it was alleged the defendant in error had discriminated, said:

> "May I just remark to your Honor one further word, in connection with the admission; if the Berwind-White Company's cars, which I have mentioned, should not be counted, your Honor will understand that our claim falls, if that is determined, because we have gotten what cars we were entitled to on that basis."
>
> (Transcript of Record, page 65.)

The theory of the plaintiff in error as to the rule which should have governed the defendant in error in the distribution of its cars is sufficiently disclosed by the statement prepared by it from the records of the defendant in error (known and referred to throughout the testimony as the "Car Distribution Sheets") which will be found at page 27 of the Transcript of Record. This statement shows the number of cars which the plaintiff in error claimed it should have received in the months embraced therein, and this number is ascertained, as the statement shows, in the following manner:

The total number of cars of all classes is shown, and the number of these which the plaintiff in error, under its theory, should have received is determined by allotting to it whatever percentage thereof its mine's rating entitled it to.

Thus, in the first month embraced in this statement, that of March, 1902, it is shown that the total number of

cars placed at all mines in the region in which plaintiff in error's mine was located numbered 6135. It will be noticed that these are designated in the statement as "Total wooden cars in region," and that the figure of 6135 exceeds in the aggregate the number of steel cars and other cars which are shown in the statement as having been placed in the region. This apparent discrepancy, however, is due to the fact that because of the greater size and capacity of the steel cars these were counted as the equivalent of two wooden cars, and as the distribution was made upon a wooden car basis, the total cars for distribution in the region calculated upon a wooden basis were always in excess of the actual number of cars placed if these included any steel cars.

In this month of March the defendant in error had for distribution 6135 cars. The plaintiff in error, having regard to the ratings of all mines in the region and the rating of its own mines, was entitled, under its theory, to 4.2% of these 6135 cars, or 257 cars. It actually received 461, as the statement shows, and consequently in that month received 204 cars more than it was entitled to under its own theory of car distribution.

Each month embraced in this statement is dealt with in the same way, and in some the plaintiff in error is shown to have received an excess of cars, and in other months to have received less than, under its theory of distribution, it ought to have received.

The figures embraced in this statement in respect to the distribution made to the Berwind-White Coal Mining Company are immaterial to any issue in the case and were apparently introduced merely for the purpose of showing an excessive delivery of cars to that Company based upon the plaintiff in error's theory as to the method that should have been pursued by the defendant in error in distributing its cars.

That the figures do not show an excessive delivery to the Berwind-White Company, except upon the plaintiff in

error's theory of distribution, is established by the admission of counsel for the plaintiff in error above referred to.

That the statement to which we have been referring included all cars placed at the mines in the region in which the plaintiff in error's mine was located was admitted, as will appear from the following extract from the Transcript of Record:

> "Mr. Glasgow: I will state, as Mr. Wigton has stated, that this statement is prepared and gives the total number of cars in the region each month for the shipment of coal.
>
> "Mr. Gowen: If you will say in addition to that, that it includes the individual cars belonging to certain shippers, that it includes the fuel cars placed by the Pennsylvania Railroad Co. for its own supply, and fuel cars of foreign railroads, consigned to mines on the Tyrone Region for their supply—
>
> "Mr. Glasgow: If that is a fact—I mean, if there are any such cars on the sheet, then our statement embraces those. It includes everything on the sheet."
>
> (Transcript of Record, page 18.)

The number of cars of the three classes referred to in this colloquy which were shown on the distribution sheets of the defendant in error and which were consequently embraced in this statement, is shown by the statement which will be found at page 77 of the Transcript of Record, from which it appears that the cars shown by these sheets as having been placed at the mines in the Tyrone Region in the years 1902 to 1905, both inclusive, were as follows:

	Individual	Company coal	System	Commercial. Foreign	Box	Total
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

By the declaration or statement of claim, the plaintiff in error alleged and averred that in the period between January 1, 1900, and December 31, 1905, the defendant in error had failed to deliver to it the cars which it claimed it should have received, under the theory of distribution already referred to.

Upon the trial its evidence was confined to certain months in this period. It did not show what the distribution had been in any of the months preceding March, 1902. As to the months beginning with March, 1902, the claim was narrowed down and limited to but 14 out of the 46 months embraced in the period, because it was admitted that in the remaining 32 months the plaintiff in error had received cars in excess of its percentage, even when this was ascertained in accordance with its own theory. As to these 32 months, the President of the plaintiff in error testified as follows:

> "Q. Those were excluded because in all those months you had cars in excess of the percentage you were entitled to?
>
> "A. Yes; in some quite a large excess and in others just a little, a trifle, but always an excess."
>
> (Transcript of Record, page 41.)

The effect upon the plaintiff in error's claim, accepting as correct its own theory of distribution, of the inclusion of all the months in the years 1902 to 1905, both inclusive, is shown by the statements which will be found at pages 75 and 76 of the Transcript of Record, from which it appears that in each of these years the plaintiff in error received cars sufficient to enable it to ship a larger percentage of the rated capacity of its mine than the mines, as a whole, received in the region in which its mine was located.

At the close of the testimony by agreement of the parties a special verdict was rendered by direction of the Court,

by which the jury found that the plaintiff's claim, if it was to be ascertained in the manner set forth in a certain Exhibit filed by it, was correct as to amount, the question whether it was properly ascertained being reserved for the consideration of the Court. (See Transcript of Record, page 78.)

The questions thus reserved were not passed upon by the Circuit Court because of the conclusion reached by it that it was without jurisdiction to pass upon and determine these, which conclusion resulted in the dismissal of the case.

Following this order of dismissal, the plaintiff in error appealed to the Circuit Court of Appeals. The jurisdiction of that Court to review the action of the Circuit Court was raised by the defendant in error through a motion to dismiss the appeal. This motion was overruled, the question of jurisdiction of the Circuit Court to entertain the case was passed upon, and the action of that Court in dismissing it for want of jurisdiction was sustained.

Before the Circuit Court of Appeals the plaintiff in error contended that that Court had the right to pass both upon the question of jurisdiction and upon the other issues involved in the case, notwithstanding the fact that these other issues had not been passed upon by the Circuit Court. This contention was controverted by the defendant in error, the position taken by it being that the only issue which the Circuit Court of Appeals could consider was that which involved the jurisdiction or right of the Circuit Court to entertain the action.

The Circuit Court of Appeals held that the other issues than that of jurisdiction were before it to such an extent at least as to justify the appeal to that Court. If that Court had not so found, it is clearly inferable from the opinion delivered by it that the motion made by the defendant in error to dismiss the appeal would have been sustained, for in the opinion of Circuit Judge Lanning overruling this motion the jurisdiction which the Circuit Court of Appeals

regarded as at issue was that of the Circuit Court as a Federal Court.

> "The Circuit Court," said Judge Lanning, "concluded that the Interstate Commerce Commission had original jurisdiction in the case and therefore it refused to enter judgment for the plaintiff on the special verdict and entered judgment dismissing the action for want of jurisdiction. *The question of jurisdiction was one concerning the jurisdiction of the circuit court as a federal court.*"
>
> (Transcript of Record, page 119.)

ARGUMENT

RIGHT OF THIS COURT TO REVIEW UNDER PRESENT WRIT OF ERROR.

Before considering the question of the power of the Circuit Court to entertain the action reference should be made to the question of the right of this Court to review under the present writ of error the judgment of the Circuit Court dismissing the case, and of the Circuit Court of Appeals sustaining such dismissal, for if the judgment of the Circuit Court was only open to review through an appeal directly to this Court, then it would seem that the case is improperly here, and that the writ of error should be dismissed on this ground.

Under the decisions of this Court it would seem to be indisputable that if the question of jurisdiction which was presented to, and resolved by, the Circuit Court had reference to its jurisdiction or power as a Federal Court, the judgment of that Court can only be reviewed through and by means of a writ of error directly from this Court.

And it would seem to be equally indisputable that the jurisdiction of the Circuit Court as a Federal Court is involved whenever its jurisdiction is questioned or attacked

upon the ground of lack of power under the Federal Constitution or Statutes to determine the controversy.

In the present case the action was brought to recover damages which the plaintiff in error claimed it had sustained due to the establishment and enforcement by the defendant in error of a rule or regulation providing for the distribution of its coal car equipment which rule or regulation the plaintiff in error alleged was unlawful because violative of the provisions of the Interstate Commerce Act.

The action was brought in the Circuit Court, not because of the citizenship of the parties, for they were both citizens of the same State, but because of the character of the action, and the jurisdiction invoked was that which was assumed to have been conferred upon the Circuit Court by Section 9 of the Interstate Commerce Act.

Unquestionably the Section of the Interstate Commerce Act thus invoked purports to, and does, confer jurisdiction and power upon Circuit Courts to entertain certain proceedings or actions, and necessarily it would seem to follow that if the extent of the jurisdiction or power thereby conferred is questioned or challenged, a case is presented which involves the extent of the power and jurisdiction of such Courts, not as Courts of general jurisdiction, but as courts of the United States exercising powers conferred upon them by a Statute of the United States.

The effect of the dual grant of power contained in Section 9 of the Interstate Commerce Act has been the subject of consideration by this Court in several cases, and the conclusion to be drawn from the decisions in these cases is, we submit, that in respect to questions similar to that with which we are concerned in the present case, the Circuit Courts have not had conferred upon them by this Section power to pass upon the validity of rules or regulations of a carrier of the character involved in the present case, because of the intention of Congress, as evidenced by other provisions of the Interstate Commerce Act, that

such rules and regulations should be subject to the regulatory administrative power and control of the Interstate Commerce Commission, and of that body alone.

The present is not a case in which the Court would be empowered to exercise its jurisdiction for the purpose of determining the matter in controversy, provided some preliminary action had been had by the Interstate Commerce Commission, as would seem to be the contention of the plaintiff in error, because, as we read the decisions of this Court, the power to determine the matter in controversy would still be non-existent in the Courts, even although action in respect thereto had been had by the Commission.

The matter in controversy in the present case is what method or system of car distribution should have been pursued by the defendant in error, and it would seem to be a necessary conclusion from the decision of this Court in the case of *Interstate Commerce Commission vs. Illinois Central Railroad Company*, 215 U. S. 452, that the Circuit Courts were without power, not merely to pass upon and determine this question primarily, but even to do so after action in respect thereto by the Interstate Commerce Commission, for in that case it was held by this Court that the determination by the Commission of the correct method of distribution which should be pursued by a carrier was binding and conclusive upon the Courts.

It is of course true that the conclusion reached by this Court in respect to the lack of power of the Circuit Courts to take jurisdiction of controversies of the character involved in the present case has been rested, in part at least, upon the view that Congress intended by the Interstate Commerce Act to confer upon the Interstate Commerce Commission exclusive jurisdiction to determine controversies of such a character, and it consequently may be urged that as the grant of this exclusive power to the Interstate Commerce Commission affects all courts, State as well as Federal, any objection to the jurisdiction of the Circuit

Courts based upon this grant of power to the Commission applies as well to any other Courts, and that as a consequence the issue raised by such an objection is not one affecting the jurisdiction of Federal Courts as such, but is one affecting the jurisdiction of all courts.

Any such contention, however, would seem to be answered by this consideration, that an action of the character of the present one, which involves alleged violations by a common carrier of obligations or prohibitions imposed upon it, or to which it is made subject, by the Interstate Commerce Act, must, because of Section 9 of that Act, be brought either before the Commission or in the Federal Courts, and consequently the grant of power to the Interstate Commerce Commission can operate only as a limitation upon the power or jurisdiction of the Federal Courts.

But even though this grant of power to the Commission could operate in some way to restrict or limit the powers of State courts, this consideration should not, we submit, have the effect of converting what would otherwise be a limitation upon the power of the Circuit Courts as Federal Courts into some other sort or kind or limitation upon the powers of these Courts, and this view, it would seem, is sustained by the decision of this Court in the case of *Davis vs. Railway Company*, 217 U. S. 157. In that case an action had been brought in a State court of Iowa, and under the laws of that state writs of attachment had issued under which certain cars of the defendant had been seized. The case was subsequently removed to the Circuit Court of the United States, and following this removal a motion was made on behalf of the defendant to quash and set aside the service of the attachment. This motion the court sustained, and as it also held that it had not otherwise acquired jurisdiction over the defendant, the action itself was dismissed. Thereupon the plaintiff sued out a writ of error and removed the case to the Circuit Court of Appeals, which,

on motion of the defendant in error, dismissed the writ upon the ground that the question involved was one affecting the jurisdiction of the Circuit Court as a Federal Court, and that the writ of error should consequently have issued from this Court.

Following this decision of the Circuit Court of Appeals, the plaintiff in error in that court, and the plaintiff in the Circuit Court, sued out a writ of error to this Court, and thereupon a motion was made by the defendant to dismiss the writ of error on various grounds, one of which was that the jurisdiction of the court as a Federal court had not been put in issue, and that as a consequence the writ of error had been wrongfully issued.

This Court, however, dismissed this motion, and in its opinion adopted as the basis of its judgment the following extract from the opinion delivered by the Circuit Court of Appeals:

> "Were the cars and credits of the defendant subject to judgment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for the want of jurisdiction. In respect to the essential character of these questions, they are not distinguishable from one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of the trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed 'jurisdiction.' It is none the less a jurisdictional matter in the case of judgment and garnishment of the property of a non-resident because the power of the court to proceed to trial depends in the absence of

the defendant upon the lawful seizure of his property. The question of jurisdiction was decided in favor of the defendant, and the decision disposed of the case."

In the case to which we have just referred the objection to the power or jurisdiction of the Circuit Court which was treated by this Court as a challenge of its jurisdiction as a Federal Court was one which would have applied equally to a State Court, but notwithstanding this fact it was held that the objection raised an issue as to the jurisdiction of the Circuit Court as a Federal Court.

In the case of *Darnell vs. Illinois Central Railroad Company,* 225 U. S. 243, this Court was required to determine whether a writ of error directly from the Circuit Court to it was justified under the circumstances of that case. The plaintiff in that case had commenced an action in a State Court to recover the excess paid by him as a shipper of lumber over the rate which in his declaration he averred had been found by the Interstate Commerce Commission to have been a reasonable rate for the service rendered. While the declaration averred that the rate paid by the plaintiff had been in excess of that which was declared by the Commission to be a reasonable rate, it did not aver that the plaintiff had applied to, and had secured from, the Commission any order of reparation.

The case was removed from the State to the Circuit Court upon the ground of the diverse citizenship of the parties, and in the Circuit Court the defendant demurred to the declaration upon the ground that it failed to disclose a cause of action, due to the failure to aver that an order of reparation had been obtained from the Commission.

The Circuit Court sustained the demurrer, and thereafter dismissed the case, and filed a certificate to the effect that the order of dismissal was "based solely on the ground that the declaration disclosed the infraction of no right arising under or out of the Federal laws or Constitution of which this Court *now* has jurisdiction." Thereupon a writ of error was sued out directly to this Court, which

writ was subsequently dismissed upon the ground that this Court could not directly review the correctness of the order of dismissal.

In this case it is to be observed that if the view upon which the Circuit Court acted was correct, viz., that the question at issue—the case having originally been instituted in a State Court—was the jurisdiction of that Court rather than of the Circuit Court to entertain the action, the jurisdiction of the latter Court as a Federal Court was of course not involved.

Moreover, the plaintiff in the case to which we are referring was proceeding under a section of the Interstate Commerce Act, viz., Section 16, for the recovery of an amount claimed to be due as the result of an order or decision of the Interstate Commerce Commission, and under the provisions of this section such an action was maintainable both in the State and Federal Courts, while in the present case the right of action asserted, which is necessarily under Section 9 of the Act, is not cognizable by State Courts.

But apart from these considerations, the conclusion reached by this Court in this Darnell case is not, we submit, at all inconsistent or at variance with the contention advanced by us. The plaintiff in that case, treating the action of the Interstate Commerce Commission as legally equivalent to an award in his favor of the amount which he had paid in excess of a reasonable rate, brought the action to recover this amount. It was of course essential that his declaration should show the necessary preliminary action of the Commission, this being essential not for the purpose of establishing the jurisdiction or power of the Court to entertain the action, but to establish that the plaintiff had a cause of action.

> "Whether the plaintiff," said the Chief Justice, delivering the opinion of the Court, "was entitled to the relief prayed in the absence of an averment of previous action by the Interstate Commerce Com-

mission, involved merely the determination of whether there was a cause of action stated."

Unquestionably the Circuit Courts of the United States have jurisdiction to entertain actions to recover amounts due plaintiffs in whose favor an award had been made by the Interstate Commerce Commission. If a plaintiff, therefore, brings an action to recover an amount which he claims was thus awarded to him, the jurisdiction and power of the Court to entertain the action cannot be successfully denied, but if the plaintiff should fail to establish its case by its proofs, it will not fail because of lack of jurisdiction of the Court to entertain the action. Nor could the failure of a plaintiff in such a case, due to its omission or neglect to sufficiently set forth its case in its declaration, be ascribable to the want of jurisdiction on the part of the Court to consider and determine the action any more than in the case where the failure results from some invalidity or insufficiency in the proofs.

In the Darnell case both the Court in which the action had been originally brought and the Court to which it was removed were undoubtedly possessed of the power and jurisdiction invoked by the plaintiff, but the failure of the plaintiff to state a case prevented the exertion of the power or the exercise of the jurisdiction thus invoked.

In the present case the Circuit Court was asked to exercise a power or jurisdiction which it did not possess, not because of any failure on the part of the plaintiff to sufficiently state or prove its case, but because the power or jurisdiction invoked was not possessed by the Circuit Court, but had been conferred by Congress upon the Interstate Commerce Commission.

RIGHT OF CIRCUIT COURT TO ENTERTAIN THE ACTION

To entitle the plaintiff in error to recover, it was essential, we submit, that three propositions should have been established by it.

1. That the rule or system established and pursued by the defendant in error in the distribution of its cars was transgressive of the provisions contained in the Interstate Commerce Act prohibiting discrimination by a common carrier.

2. That the rule or system advocated by the plaintiff in error should have been pursued by the defendant in error in making the distribution of its cars.

3. That in making distribution of its equipment in any given period of time a carrier is guilty of discrimination if it fails in any month in such period to allot and deliver to each shipper his or its pro rata of cars, and that overdeliveries in other months more than sufficient to make good the shortage in any one or more months cannot be taken into consideration.

That all of these propositions were primarily, at least, for the consideration of the Interstate Commerce Commission has, we submit, been settled by the decisions of this Court.

The cases of *Interstate Commerce Commission vs. Illinois Central Railroad Company,* 215 U. S. 452, and *Baltimore & Ohio Railroad Company vs. United States, ex rel. Pitcairn Coal Company,* 215 U. S. 481, have established that that Commission has been empowered to determine the systems or methods of car distribution that should be pursued by carriers in times of car shortage, and that the determination of that body as to the system or method to be pursued in order to avoid discrimination between shippers is controlling upon the Courts.

In the present case the plaintiff in error attacked as discriminatory and as consequently unlawful the regulation or rule which had governed the defendant in error in the distribution of its equipment, and sought to have substituted therefor a different regulation or rule as the one which should have governed in such distribution.

Certainly it cannot be denied that under the decisions to which we have referred the power and authority of the Interstate Commerce Commission must be regarded as extending to and embracing the authority necessary to pass upon and determine whether the method or system of the defendant in error was proper, and if not, whether that advocated by the plaintiff in error was the proper and correct one.

If this be true, then necessarily the exercise of primary jurisdiction by the Court in the present case was subject to the objection which was so forcibly stated by the present Chief Justice in the Pitcairn case, and which is embodied in the following extract from the opinion delivered in that case:

> "A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

But it is urged upon behalf of the plaintiff in error that the question involved in the present case was not one affecting the reasonableness or validity of a rule of distribution adopted and pursued by the defendant in error, but that the plaintiff in error's claim was based upon the alleged failure of the defendant in error to allot and deliver to the plaintiff in error the cars which it was entitled to receive under the rule which the defendant in error had established and which was in force during the period of the action.

The facts which we submit demonstrate that the cause of action was rested not upon the failure of the defendant in error to observe its own rule or system of distribution, but upon the alleged invalidity of the rule itself, have been referred to in the "Statement of the Case," which is contained in this brief. It is hardly necessary, in view of what the Record, we believe, so clearly shows in this respect to refer to anything else than is contained in this "Statement." That both of the Courts below understood and acted upon the theory that the issue involved had to do with the validity of the defendant in error's rule of distribution, and not with any alleged infractions of it, is established by the opinions delivered both by the trial Judge in dismissing the case for want of jurisdiction, and by the Circuit Court of Appeals in sustaining his action.

After referring to the character of the rule which governed the defendant in error in the distribution of its equipment during the period of the action, Judge McPherson, in his opinion dismissing the case said:

> "Averring injury by *this method of distribution*, and asserting that the total number of the four classes (i.e., of cars) without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination.

"It will at once be observed that the suit requires a Court and jury to decide whether the defendant's *method of distribution offended against the Act.* The questions are, (1) whether *this method* gave a preference to any particular person, company, firm or corporation or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable."

(Transcript of Record, page 84.)

And in the opinion of Circuit Judge Lanning of the Circuit Court of Appeals, the point at issue and which that Court considered as determined by its decision was thus stated:

"For the present, it is sufficient for us to say that, in our opinion, a party claiming to be injured by a *discriminatory rule for the distribution of coal cars* cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has investigated the case and determined by its report *that the rule* is or was discriminatory. The determination of that question, at least, involves only the performance of administrative functions, which, under the act, are to be performed by the Commission, and not by any Court. Whether, after the Commission has found *such a rule* to be discriminatory, it is its duty to proceed to assess the damages, if any, which the complaining party has sustained, or whether they are to be recovered by an action in some court without any preliminary assessment by the Commission, is a question which, since it has not been argued before us and since its decision is not necessary to the disposition of the case we now have in hand, we should not at present decide."

(Transcript of Record, page 112.)

But the further contention is made upon behalf of the plaintiff in error that, conceding that the decisions of this Court to which we have above referred have determined that primary jurisdiction is vested in the Interstate Commerce Commission to pass upon and determine the validity of the rules and regulations of a carrier of the character with which we are concerned in the present case, when the question involved relates to rules or regulations still in force, this primary jurisdiction of the Commission does not attach, and is not exercisable in respect to the validity of rules or regulations which have been abrogated by the carriers before they have been made the subject of complaint. But manifestly this contention can have no force unless the act of a carrier in abrogating one of its rules or regulations has the effect of depriving the Interstate Commerce Commission of the jurisdiction which it otherwise would have had to pass upon and review the validity of such regulation, and, if found invalid or unlawful, to prescribe the rule or regulation which should have governed the carrier in lieu of that thus condemned.

Certainly there is nothing in the Interstate Commerce Act which would justify the conclusion, or even inference, that the carrier by its voluntary act can thus put an end to the supervisory powers of the Commission over its practices and its rates. For if the discontinuance or abrogation of a rule relative to distribution of equipment can prevent the Commission from investigating the reasonableness or validity of such rule, the same result would follow the discontinuance or abrogation of a rate.

But not only is there nothing in the Interstate Commerce Act which affords any warrant for the contention advanced by plaintiff in error in this recpect, but when the reasons are considered which have induced this Court, not only in the two cases above alluded to, but in the case in which there was first considered the effct upon the jurisdiction of the Courts of the grant of power made to the

Commission by the Interstate Commerce Act to pass upon the reasonableness of a carrier's rates and regulations, it will at once, we submit, be apparent that there is no more reason for holding the primary power of the Commission to be exclusive in respect to existing rates and regulations than there is for holding it exclusive in respect to past regulations or rates.

This Court reached the conclusion that it did in the case of *Texas & Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S. 426, mainly because, in its opinion, it was essential, in order to secure equality of treatment of shippers, that issues affecting the reasonableness of rates should be determined primarily, at least, by the Interstate Commerce Commission. It is just as important, in order that equality of treatment among shippers may be secured, that the reasonableness of rates or regulations or practices, even although these may have been abrogated or discontinued, should be determined by the Commission, otherwise shippers may fare very differently as the result of diverse and conflicting actions by courts and juries.

The following extract from the opinion of Judge McPherson sustaining the motion to dismiss so clearly and conclusively answers the plaintiff in error's contention with which we are dealing that we feel we cannot do better than quote it as embodying what we believe to be the correct view of the subject:

> "Since, therefore, the Commission alone has the power to decide primarily whether a particular method of distributing coal cars in case of shortage is preferential, I do not believe that the power is automatically transferred to the courts as soon as the carriers substitute another method, and merely for the reason that the substitution has been made. The procedure of submitting the question of discrimination to different courts and juries has been authoritatively declared to

be objectionable; but if it must nevertheless be followed in every case where the damages claimed were caused by a practice that has been changed, the uncertainty of results to which the Supreme Court has referred will bring about the very discrimination which the Act seeks to avoid. If one injured shipper recovers a verdict and another fails; or if one recovers a sum calculated according to a particular rule, and the sum awarded to his neighbor is calculated according to a different rule; an obvious discrimination among the claimants must result, for the theory of all the verdicts must be that the sums recovered fully repair the damages suffered, while it is evident that reparation is in fact partial or unequal. Inequality in recovery would necessarily produce discrimination. If, on the other hand, such claims must be submitted in the first instance to the Commission, they will be acted upon uniformly, will be adjusted according to the same rule—a rule that will presumably be adopted after a full and comprehensive view of the whole situation and of all the relevant circumstances—and the damages will be awarded, not arbitrarily or capriciously, but by the application of the same standard."

But really the plaintiff in error's contention that the exclusive primary jurisdiction of the Commission continues only during the existence of a rule or regulation or rate of a carrier is answered and disposed of by what was said by this Court in the Abilene case, for the following extracts from the opinion in that case are, we submit, totally incompatible and irreconcilable with the limitation upon the power of the Commission which is contended for by the plaintiff in error:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commis-

sion to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." (Page 442.)

"When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. *And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was in force by the carrier, and before its change and the establishment of a new one.* In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the Statute to secure, and, on the other, from enforcing that equality which the Statute commands." (Page 446.)

Indeed, neither in the Abilene case nor in the case of *Robinson vs. Baltimore & Ohio Railroad Company, 222* U. S. 506, in which this Court held that a shipper complaining of a discriminatory rate could not recover in the absence of evidence showing action by the Interstate Commerce Commission condemning the rate complained of and awarding reparation, was it affirmatively shown that the rates, the exaction of which had given rise to the actions, were still in existence, and certainly if this Court had considered

the existence or non-existence of the rates as not merely a factor, but a determining factor, in determining the jurisdiction of the Courts, some reference would have been made to this circumstance. Evidently it was considered wholly immaterial whether the rates complained of were or were not in force at the time the actions were instituted.

But the further contention is advanced by the plaintiff in error that the Interstate Commerce Commission has determined the method of car distribution which should have been pursued by the defendant, and that the system thus approved did not accord with that which was in force throughout the period of the action.

It might be sufficient to say as to this contention that in the case of *Robinson vs. Baltimore & Ohio Railroad Company* (*supra*) this Court determined that decisions of the Commission which were not properly proved and put in evidence could not be considered, and in the present case, the record discloses no decision of the character referred to.

It is true that the Commission has in a number of cases determined the system or method of car distribution which should be pursued by carriers in times of car shortage, and has so determined in respect to the system which should have been followed by the defendant in error. It is also true that it found the rule or system of distribution complained of by the plaintiff in error in the present case objectionable and unlawful, but it is also true that the system or rule which it prescribed as the one that should be followed and observed by the defendant in error was not that which the plaintiff in error contends for and which forms the basis for its claim for damages in the present case. This system the Commission declined to approve and enforce.

So that if this Court were at liberty to refer to the rulings of the Commission, and were to determine the issues involved in the present case with reference to, and in accord-

ance with, these rulings, the necessary conclusion, we submit, would be that both the systems of distribution contended for by the parties hereto were objectionable and invalid.

But plaintiff in error makes this suggestion or point: Granting, it says, that it was not entitled to share in the distribution of all the cars which were placed by the defendant in error at the mines in the region in which its mine was located, due to the fact that some of these cars were the individual or private cars of other shippers, that some were the cars of the defendant in error which were placed at certain mines to be loaded with coal for its own fuel supply, and that still others were cars of other railroad companies which had been delivered to the defendant in error in order to be placed at certain mines from which the companies, owners of these cars, were drawing their fuel supply (and under the rulings of the Interstate Commerce Commission these three classes of cars are not regarded or treated as distributable), nevertheless it established, as it contends, a *prima facie* case by the proof adduced by it that in the months which it selected from the whole period of the action it had not received its pro rata share based upon its mine ratings of all the cars, including those of the three classes named, that were placed at the mines in the region, and that this *prima facie* case had not been rebutted or overthrown by testimony adduced upon the part of the defendant in error.

Briefly this contention amounts to this: That a shipper who is entitled to share in the distribution of one out of four different kinds or classes of cars establishes that he has not got the share of the one class in the allotment of which he was entitled to participate by proof that he has not got his share of the aggregate of the four classes.

Some propositions have only to be stated in order that their unsoundness may be demonstrated, and this contention seems to be one of that character.

The evidence adduced by the plaintiff in error itself established that in estimating the number of cars which it claimed it should have received of those which the defendant in error placed at the mines in the region in which the plaintiff in error's mines were located, it had treated as distributable all of the cars of every character which were placed at these mines. Its evidence did not show how many of these cars were of a character which would remove them from the distributable class. If this was a matter of any moment or significance, this omission was supplied by the evidence presented by the defendant in error, which showed the number of cars of each class which were included in those placed at the mines in this region. The contention, therefore, of the plaintiff in error was fully answered, if there was any necessity for an answer, which is embodied in the following extract from the argument embraced in its brief in this case:

(Record, page 77.)

> "If the appellee relies upon the fact that a certain number of cars were of special character and therefore to be taken out of the general distribution, we submit that the burden is upon it to show the number of such cars and the proof being insufficient to establish the number of such cars, the appellant cannot be defeated on this ground.
>
> (Brief of Appellant, page 61.)

The third proposition above referred to was also one, we submit, for the primary consideration and determination of the Interstate Commerce Commission. The contention of the plaintiff in error was that the distributable cars should have been so allotted and distributed that in each month included within the period of the action the plaintiff in error should have received its proper pro rata thereof, and that a method of distribution under which the shortages of any one month could be made up in succeeding

or other months did not comport with or fulfill the obligations to which the defendant in error was subject in respect to the distribution of its cars.

In one sense it is true, as contended for by the plaintiff in error, that the distribution of its cars by the defendant in error was a daily act, but it is only true in the sense that this distribution was made daily. As a matter of fact, it was more in the nature of a continuous act, and while it was doubtless incumbent upon the defendant in error to allot daily to each shipper, when reasonably practicable, his pro rata of the cars which were available for distribution on that day, it was not, we submit, incumbent upon it to ignore and disregard its own interests and to subject itself to burdensome conditions and excessive expense in an effort to accomplish this result. If all carriers were conducting their operations under conditions which were so similar as to make a uniform rule on this subject reasonable and practicable, there might be some justification for the contention that a Court could reasonably determine what periods of time should be considered in determining whether there had been a failure on the part of the carrier to properly distribute its cars, or in other words, what periods could be properly allowed for equalizing distribution, which must necessarily be unequal for short periods. But, as is perfectly well known to this Court, the conditions affecting carriers are so different that no uniform rule could be framed on this subject which would be fair or would adapt itself equitably to the varying conditions existing on different roads.

Where a railroad company has but a few mines to supply with cars, and these are located in one, and that a restricted, region or territory, the problem of equal distribution is a comparatively easy one, as compared with that confronting a railroad company which, like the defendant in error, has over 500 mines to supply with cars, located in various districts or regions, and spread over a territory

more than 100 miles in extent. Manifestly, under such circumstances, there are features or problems to be considered and determined which are not presented in the case of the carrier which is not called upon to consider the many and complex features which necessarily confront the de-defendant in error.

Some uniform rule as to each carrier would have to be adopted and applied as to the period within which deliveries could be equalized without injustice to shipper or carrier, and such a rule could only, we submit, be established by action of the Interstate Commerce Commission. Courts are really less competent and less fitted to deal with this problem than with one which had to do with the proper system of distribution.

Inasmuch, therefore, as the Circuit Court would have been required in the exercise of the power and jurisdiction invoked by the plaintiff in error to exercise and usurp powers and functions withheld from it and conferred by Congress upon the Interstate Commerce Commission, it committed no error in declining to take jurisdiction of the case and in dismissing the same.

FREDERIC D. McKENNEY
FRANCIS I. GOWEN
JOHN G. JOHNSON
For Defendant in Error

MORRISDALE COAL COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 207. Argued April 15, 1913.—Decided June 9, 1913.

Without preliminary action by the Interstate Commerce Commission declaring that the carrier had, by the rule adopted in regard to distribution of cars, discriminated against a shipper in such distribution, the Federal courts have no jurisdiction of a suit by such shipper for damages alleged to be occasioned by undue discrimination against him and undue preference in favor of his competitor.

The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission.

Where the alleged discriminations in distribution of cars occurred more than two years before its commencement, the action cannot be stayed to permit an application to the Interstate Commerce Commission as, under the act of June 29, 1906, all of such claims are barred after two years. *Southern Railway* v. *Tift*, 206 U. S. 434.

THE facts are stated in the opinion.

Mr. William A. Glasgow, Jr., with whom *Mr. Chester N. Farr, Jr.*, was on the brief, for appellant:

This action was brought in the Circuit Court of the United States under § 9 of the Act to Regulate Commerce to recover damages by reason of a violation by the carrier of § 3 of that act.

Under § 9 of the act, the person damaged may proceed by "complaint to the Commission," or "may bring suit . . . for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction."

For violation of § 3, § 8 gives the party aggrieved the

right to recover in the forums provided by § 9, "the full amount of damages sustained in consequence of any such violation of the provisions of this act."

The complaint was that the defendant, during the period from 1902 to January 1, 1906, promulgated certain rules providing a *pro rata* coal car distribution when it was unable to furnish all the cars which shippers needed, and that during such period the defendant unjustly discriminated against plaintiff by: (a) violating such rules, or (b) establishing and carrying out rules which unjustly discriminated against plaintiff. On January 1, 1906, the defendant canceled the rules theretofore in effect, and established rules which were not thereafter complained of, and the purpose of the action was to recover damages for past violation of § 3 of the act. There was a verdict for the plaintiff, and upon a question of law reserved, the court held that the proceedings should in the first instance have been by complaint to the Interstate Commerce Commission, under the case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and thereupon entered judgment for defendant. This judgment was affirmed by the Circuit Court of Appeals, and the judgment of that court is here for review.

The plaintiff is entitled to the right of action in the Circuit Court given by § 9 of the act, unless the exercise thereof would "deprive the subsequent statute of its efficiency; in other words, render its provisions nugatory." *Abilene Cotton Oil Co. Case*, 204 U. S. 437.

The complaint is only required to be made to the Commission in the first instance when "there is involved a question of administrative discretion." *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70.

And where there is involved "a question of administrative discretion," there must necessarily be a complaint to the Commission in the first instance, for in such case the finding of fact by the Commission, when the proceed-

ing is according to law, is conclusive and beyond the competency of any court to reëxamine. *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, at page 550; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, at page 255.

A question of "administrative discretion" can only arise upon and be "involved" in the consideration of a present or future action or course of conduct. It cannot arise in a judicial or quasi judicial determination of whether a past course of conduct either (a) violated certain rules, or (b) created unjust discrimination. The reason for requiring a complaint to the Commission in the first instance when a question of "administrative discretion" is involved is clear, because the finding of fact thereon by the Commission is "conclusive," and no court is competent "to reëxamine" such finding.

The present case, however, is an action brought in 1908 for damages accruing prior to January 1, 1906, and for a cause which did not exist after that date. It involved no question of "administrative discretion," but a judicial determination of whether the carrier during a period in the past (a) violated its rule, or (b) whether such rules in the past discriminated against plaintiff.

In this case, if there had been complaint to the Commission in the first instance, and it had found the fact of violation of the rules or discrimination, and ordered the payment of the damages to which plaintiff was entitled, such finding and order would have to be enforced by an action at law in the Circuit Court and trial by jury, upon the same issues passed upon by the Commission, in which action the finding of the Commission and its order would only be "*prima facie* evidence of the facts therein stated." See Act to Regulate Commerce, § 16.

It is perfectly reasonable, therefore, to hold that in a case where the finding of fact by the Commission is conclusive under the act, that resort must be had in the first instance to the Commission and then to the courts. It

is equally as unreasonable to hold that when, under § 9, a party may proceed for the recovery of damages for past grievances, either by complaint to the Commission or by action in the Circuit Court, that he must in the first instance complain to the Commission, and then have a jury pass upon exactly the same issues, with the finding of the Commission as *prima facie* evidence only.

When the plaintiff has the option under § 9 to complain to the Commission or by action in the Circuit Court, there can be no reason to require him to complain to the Commission in the first instance, when the *prima facie* finding of the Commission must be submitted to the court and jury, and may be promptly rejected.

When the question is one of "administrative discretion," every reason would require a party to secure in the first instance the "conclusive" finding of fact by the Commission; otherwise confusion would arise in having a court not charged with administrative duty to find the facts, instead of the Commission, which was charged with the duty of administration in connection with the question involved. When, however, the complaint is simply to recover damages for past wrongs, no reason can require the party to get, in the first instance, the *prima facie* finding of the Commission to submit to a jury which, by § 9, has the right to pass upon the case in the first instance, and no confusion can arise because the finding of the Commission in such a case is only *prima facie* and must finally be submitted to the jury. When no confusion can arise as between the Interstate Commerce Commission and the Circuit Court, jurisdiction remains in the Circuit Court. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, at pages 440, 441.

Mr. John G. Johnson, with whom *Mr. Frederic D. McKenney* and *Mr. Francis I. Gowen* were on the brief, for appellee:

The coal company can only recover in case it establishes:

That the rule or system established and pursued by the railroad company or in the distribution of its cars was transgressive of the provisions contained in the Interstate Commerce Act prohibiting discrimination by a common carrier.

That the rule or system advocated by the coal company should have been pursued by the railroad company in making the distribution of its cars.

That in making distribution of its equipment in any given period of time a carrier is guilty of discrimination if it fails in any month in such period to allot and deliver to each shipper his or its *pro rata* of cars, and that over-deliveries in other months more than sufficient to make good the shortage in any one or more months cannot be taken into consideration.

All of these propositions were primarily, at least, for the consideration of the Interstate Commerce Commission. *Int. Com. Comm.* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481.

In this case the coal company attacked as discriminatory, and as consequently unlawful, the regulation or rule which had governed the railroad company in the distribution of its equipment, and sought to have substituted therefor a different regulation or rule as the one which should have governed in such distribution.

The power and authority of the Interstate Commerce Commission must be regarded as extending to and embracing the authority necessary to pass upon and determine whether the method or system of the defendant in error was proper, and if not, whether that advocated by the plaintiff in error was the proper and correct one.

MR. JUSTICE LAMAR delivered the opinion of the court.

There are a large number of coal mines in the Clearfield District, Tyrone Division of the Coal Region, in the State

of Pennsylvania. Between January 1, 1900, and December 31, 1905, the total output of the mines in the Clearfield District averaged 18,500 tons per day. When there was a car shortage, the Pennsylvania Railroad allotted to each mine a percentage of cars assigned to the District, calculated according to the capacity of the mine.

On this basis the Morrisdale Coal Company was entitled to about 4.8 per cent and the Berwind-White Company to about 18 per cent.

In 1908 the Morrisdale Company brought suit against the Railroad for damages alleged to have been occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor, the Berwind-White Company.

Alleging that in violation of its duty to see that no undue preference was given to any other person or corporation in the District, the carrier failed to assign to the plaintiff its *fair proportion of the entire number of coal cars of the Railroad Company*, to which plaintiff was entitled and that this failure continued from the beginning of 1900 to the close of 1905, the effect of which was to subject plaintiff to unreasonable prejudice with respect to the facilities for shipping coal as contrasted with the facilities furnished other competitors in the Clearfield District, and as a result of the unfair discrimination and the failure to furnish a proper allotment of cars and equal facilities, plaintiff was obliged to buy coal at various times in the outside market at prices then prevailing in order to fill its contracts previously entered into—to its damage $250,000. The defendant entered a plea of not guilty and *actio non accrevit infra sex annos*. On the trial, the jury found that the exhibit showing damages of $67,156.07 was correct. "If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, we find for the plaintiff. If,

however, the court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

There was no conflict in the evidence, and in view of the admissions of the plaintiff incorporated in the record, the facts can be briefly stated.

The capacity of plaintiff's mine was 4.8 per cent. of the output of the Clearfield region, and having been furnished access to the books of the carrier, it made up a statement showing that during 23 months between March, 1902, and December 31, 1905, in which there was a car shortage, the Morrisdale Company received less than its 4.8 of all the coal cars in the Clearfield region, while the Berwind-White Company received more than its 18 per cent. of all the coal cars in the region. This was admitted by the Railroad, which insisted that during periods of car shortage it divided the cars into four classes:

1. Private cars, belonging to persons or corporations operating mines in the district;
2. Cars of foreign railroads consigned to designated mines to be loaded with fuel for such foreign railroads;
3. Pennsylvania Railroad fuel cars, consigned to designated mines to be loaded with fuel for railroad use;
4. The balance, or System cars, available for general use, it distributed among the various mines in the proportion their capacity bore to the total output of the Clearfield region, the plaintiff being allotted its due proportion, or 4.8 per cent thereof.

The Railroad explained that the apparent excess of cars furnished the Berwind-White Company during the 23 months referred to was due to the fact that that company owned a large number of private cars on which it appeared that wheelage was paid and submitted the following table

showing the number and character of cars in the Clearfield Region during those years:

	Individual	Company coal	System	Foreign	Commercial Box	Total
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

During the trial plaintiff admitted that there had been no intentional discrimination against it, but contended that its statement was made up from the books on the basis of what it considered to be the law of the case, under which *all cars available for shipment of coal should be counted in the distribution.*

Plaintiff admitted that if the Berwind-White Company was entitled to the use of their private cars, without counting them against what it was entitled to under the percentage, then the Berwind-White Company did not get an excess of their percentage. It further admitted that if Fuel cars of the Pennsylvania Railroad, and Fuel cars of foreign railroads, consigned to particular mines were not to be counted against such mines, then plaintiff had no cause of complaint, inasmuch as it had received its percentage of the balance or system cars.

The Circuit Court dismissed the case on the ground that, without preliminary action by the Commission, the court had no jurisdiction of a suit for damages alleged to be occasioned by undue discrimination against the plaintiff and undue preference in favor of its competitor.

The plaintiff took the case to the Circuit Court of Appeals, complaining of this ruling and further assigning error in that the court failed to enter judgment in its favor on the special verdict.

The Circuit Court of Appeals held, one judge dissenting, that the plaintiff had the option of taking the question

of jurisdiction by direct writ of error to the Supreme Court of the United States, or it could take the whole case, including the matter of jurisdiction, to the Circuit Court of Appeals. That court, thereupon, considered the whole record, and (one judge dissenting) affirmed the judgment of the Circuit Court on the ground that the Circuit Court had no jurisdiction as a Federal court until after the Commission had passed on the reasonableness of the method of car distribution. The case was brought here, the only question presented by the record being whether the Circuit Court as a Federal court had jurisdiction.

The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387) that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. *Traer* v. *Chicago &c. R. R.*, 13 I. C. C. 451; *Hillsdale Coal Co.* v. *Pennsylvania R. R.*, 19 I. C. C. 356, 372; *Jacoby* v. *Pennsylvania R. R.*, 19 I. C. C. 392; *Minds* v. *Pennsylvania R. R.*, 20 I. C. C. 52.

It was, however, recognized that there could be no hard and fast rule and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to haul certain articles of merchandise in order to supply communities with necessaries of life. *Parks* v. *Cincinnati &c. Ry.*, 10 I. C. C. 47; *Thompson* v. *Pennsylvania R. R.*, 10 I. C. C. 640.

These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the *Pitcairn Case*, 215 U. S. 481, and in *I. C. C.* v. *Illinois Central*, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In view of the decision in the *Abilene*, *Pitcairn* and *Robinson Cases* it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule—and that, therefore, without any order of the Commission it

is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the Railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable and that *all cars in the district* should be distributed according to the capacity of the mine without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time was, as we have seen, an administrative question and to be decided by the Commission as preliminary to the right to maintain this suit. The Circuit Court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced.

It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to *Southern Ry.* v. *Tift*, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and

on it the Circuit Court made an order of restitution (206 U. S. 436). But, in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to Dec. 31, 1905. The suit was brought July 17, 1908, more than two and a half years later and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, c. 3591, that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued and not after and a petition for the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; Provided that claims accrued prior to the passage of this act may be presented within one year."

The provisions of this statute would prevent the modification asked for, and the judgment is

Affirmed.

MR. JUSTICE PITNEY dissented.[1]

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[1] For dissenting opinion of MR. JUSTICE PITNEY in this case and in *Mitchell Coal & Coke Company* v. *Pennsylvania Railroad Company*, see *ante*, p. 267.